IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

JOHN McCARDLE, MAURICE DOUGLASS, OSCAR RATTS, FRANK WAMPLER AND SAMUEL ARTMAN, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF INDIANA AND CITY OF INDIANAPOLIS,

Appellants,

v.

INDIANAPOLIS WATER COMPANY,

Appellee.

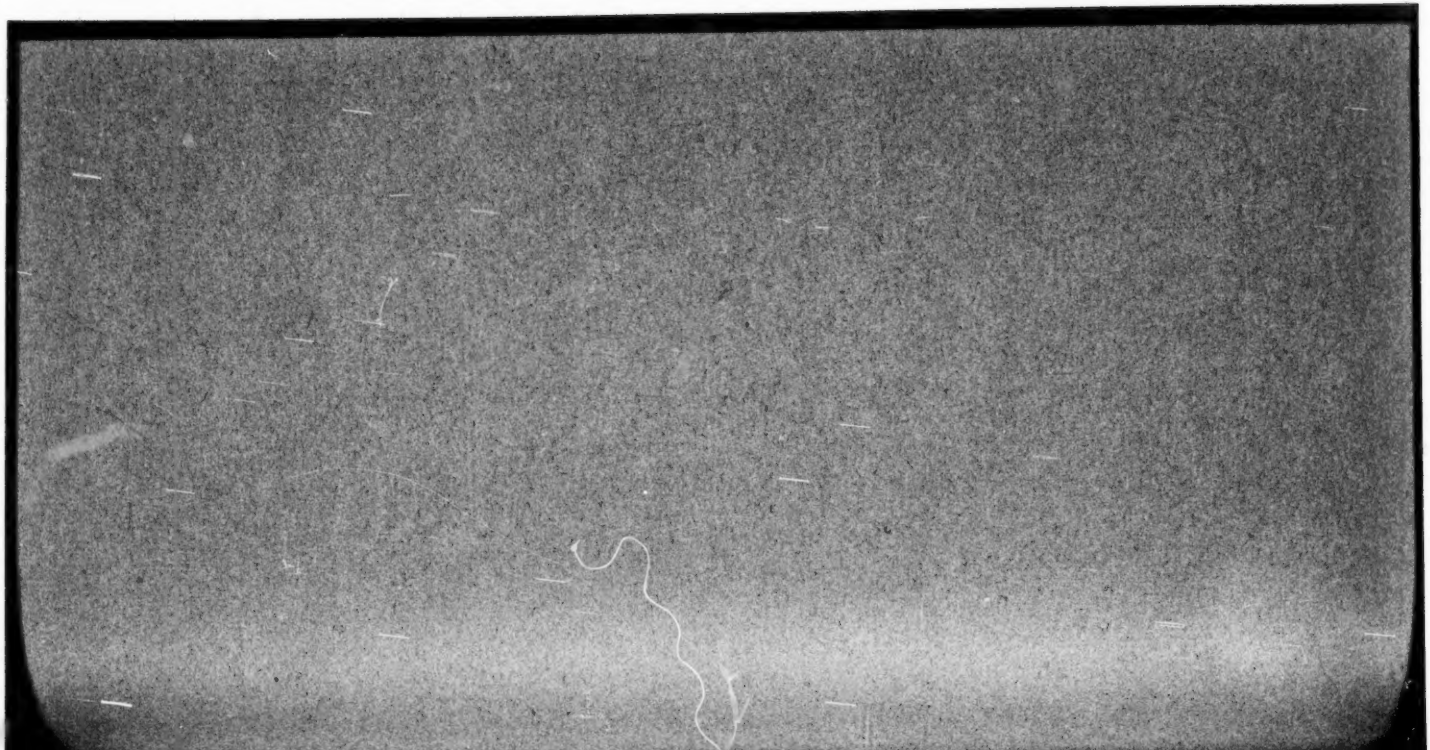
No. 37

APPELLANTS' BRIEF.

PUBLIC SERVICE COMMISSION OF INDIANA,
BY ARTHUR L. GILLIOM,
Attorney General of Indiana,
EDWARD [redacted] WHITE,
Assistant Attorney General of Indiana,
Its Solicitors.

CITY OF INDIANAPOLIS,
BY JAMES M. OGDEN,
Corporation Counsel,
CLAIR McTURNAN,
TAYLOR E. GRONINGER,
Its Solicitors.

Wm. B. Burford Printing Co., Indianapolis.



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APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

JOHN McCARDLE, MAURICE DOUGLASS, OSCAR RATTS, FRANK WAMPLER AND SAMUEL ARTMAN, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF INDIANA AND CITY OF INDIANAPOLIS,

Appellants,

v.

INDIANAPOLIS WATER COMPANY,

Appellee.

No. 245.

APPELLANTS' BRIEF.

OFFICIAL REPORT OF LOWER COURT'S OPINION.

A search of the Official Reports fails to disclose any report of the lower court's opinion in this case.

STATEMENT OF JURISDICTIONAL GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1) The judgment in this case was rendered in the United States District Court for the District of Indiana on October 3, 1924 (R. 56).

(2) The appellant, Public Service Commission of Indiana, a body created to regulate utility rates under the laws of Indiana, on November 28, 1923, approved a rate order, effective January 1, 1924, known on its docket as No. 7080. This order fixed the rate base of appellee's public service property, used in furnishing water service to the city of Indianapolis and its inhabitants, at $15,260,400 (R. 32), and authorized rates to provide a return of 7 per cent thereon (R. 31).

Appellee in its bill of complaint, filed in the United States District Court of Indiana, alleged the jurisdictional amount and attacked said order number 7080 on the ground of confiscation, and averred in its bill of complaint: that the rate base found by appellant, Public Service Commission of Indiana, was lower than the fair value of its property used and useful in its public service business; that the rates prescribed in said order were inadequate to provide a fair return upon the fair value of its property; and that said order and the rates prescribed therein would result in a taking of its property without compensation, without due process of law, and was a denial to appellee of the equal protection of the law, all in violation of the provisions of the 14th Amendment of the Constitution of the United States (R. 1-5).

The court below pronounced, orally, its opinion sustaining the material averments of appellee's bill of complaint and holding: that the valuation of appellee's property of $15,260,400, as found by appellant, Public Service Commission of Indiana, in its said order number 7080, was and is lower than the fair value of such property, on November 28, 1923, and on January 1, 1924, by more than $3,500,000; that the fair value of such property at said time was not less than $19,000,000; that the rates imposed in said order were too low and con-

fiscatory of appellee's property (R. 56-66); and that in determining a rate base or fair value, dominating or controlling consideration should be given to evidence of reproduction cost spot depreciated at the time of the inquiry (R. 58).

Judgment was entered in the form of a perpetual injunction against appellants enjoining them from taking any step to enforce said order and the schedule of rates therein embodied (R. 56).

(3) This case is brought here by direct appeal, because of the constitutional question involved, under Section 238 of the Judicial Code.

(4) The following cases sustain this court's jurisdiction in the case: *Knoxville* v. *Knoxville Water Company*, 212 U. S. 1; *Van Dyke* v. *Geary*, 244 U. S. 39; *Arkadelphia Milling Company* v. *St. Louis Southern Ry. Co.*, 249 U. S. 134, 141.

SUMMARY OF FACTS, SET OUT MORE FULLY IN THE STATEMENT OF THE CASE.

This court, in a rate case, as said in *Knoxville* v. *Knoxville Water Company*, 212 U. S. 1, has "complete freedom in dealing with the facts of each case;" and as said in *Van Dyke* v. *Geary*, 244 U. S. 39, "has jurisdiction to review the whole case." Therefore, to present a statement of the case which would enable this court to have before it all facts which might be deemed material has required such space, that for the convenience of the court, the more detailed statement is prefaced by the following summary of salient facts disclosed by the record:

The rate order in controversy 7080 was approved by appellant Public Service Commission of Indiana Novem-

ber 28, 1923, to become effective January 1, 1924. The order fixed the fair value of appellee's public service property as of May 31, 1923, at $15,260,400, of which $980,000 was allowed for going value, water rights and working capital. The order prescribed rates calculated to provide a 7% return on such fair value (R. 9, 29, 31, 32).

Prior to order 7080 appellant Commission authorized four rate orders for appellee, the first known as order 1400 in 1917 and the last known as order 5798 in 1921. Order 1400 fixed the fair value at $9,500,000; order 5798 fixed it at $10,814,000 (R. 347-348).

The valuations made in all four of these orders were accepted by appellee (R. 350).

The total gross value of appellee's property on January 1, 1924, arrived at by adding to the value $9,500,000 found in order 1400, the additions at cost less depreciation for the years from 1917 to January 1, 1924, is $11,842,210.03 (R. 353).

In January, 1923, appellant Commission authorized order 6613 for security issuance purpose only and fixed the value of all appellee's property, including the non-operative, at $16,455,000 (R. 348).

The actual total cost to appellee for all its property, both operative and non-operative as of December 31, 1923, is $9,195,908.39, of which $583,509.27 was paid through operating expenses, and $644,749.22 represents depreciation reserve money invested in property and plant (R. 316-319). Depreciation reserve money under the Indiana law cannot be capitalized (Appendix, p. 119).

The total investment in appellee's real estate as per its books is $486,834.23 (R. 319). The appraised present value of the real estate is $3,014,647 (R. 124).

The book value of all appellee's property is $13,-

222,258.83. This figure includes a net "write up" of appellee's property and plant accounts of $4,609,888.71 (R. 326).

Appellee's total capitalization—outstanding stocks and bonds—is $13,231,000. Of this capitalization $4,500,000 of the common stock and $3,000,000 of the bonds were issued as dividends to common stockholders (R. 327). Stock dividend is shown at (R. 292), the bond dividends at (R. 283-292). Of this capitalization only about $5,000,000 is represented by stocks and bonds which were sold (the remainder of the capitalization was issued as dividends).

The cost of the common stock to the present owners, who bought it in 1912, was $4,000,000 (R. 215).

The tax value of all appellee's property as submitted in its verified return to the Indiana Tax Board in 1923 was $10,853,000 and in 1924 was $12,937,100 (R. 310-314).

The sources of total gross investment in appellee's property to December 31, 1923, are: Equity in assets $49,720.50, cash realized from sale of stock and bonds $5,177,408, surplus earnings $3,423,471.67, this surplus remained in the business after payment of all operating expenses, taxes, interest and dividends. Ex. 50 (R. 319-321).

Reproduction spot appraisals as of January 1, 1924, ranged from $19,000,000 to $25,000,000.

Reproduction appraisals on an average of prices for different periods ranged from $10,000,000 to $25,000,000.

Appellee's engineers and Commission engineer allowed in their appraisals 15% structural overheads. The books of appellee showed 5.8% on property and plant investment from 1881 to December 31, 1923 (R. 321-322). They allowed a theoretical reproduction construction cost of the canal ranging from $1,049,447 to $1,232,913. The

canal was built by the State of Indiana for navigation purposes. They allowed for total accrued depreciation $850,000 to $1,117,589 for the entire life (42 2/3 years) of the property. The books of the appellee showed $1,117,268.98 charged to operating expenses for depreciation from April 1, 1909, to December 31, 1923 (R. 325).

Appellee's engineers allowed a 10 to 15% contractor's profit on all construction. The history of appellee shows it was built by "piece meal construction" and hence used its own employes and had no contractors.

Appellee's engineers allowed $2,000,000 for going value. The books of appellee show no charges for development costs (R. 147), except about $30,000 organization expenses (R. 321-322).

Appellee's engineers allow $500,000 for water rights. The books of appellee show no items for acquisition of water rights exclusive of land purchases (R. 84).

Appellee's engineers allow $235,000 for working capital. Hagenah, appellee's witness (R. 84), testified "the company had on hand at all times nearly twice as much capital as was necessary to take care of its operating expenses." This was due to 50% of the consumers paying for three month's services in advance (R. 152).

Ex. 56 (R. fol. 384 following p. 328) visualizes the financial history of appellee. The lowest annual per cent of return earned by appellee on its gross property and plant investment during its entire life (42 2/3 years) was 6.1% in 1903. This exhibit shows on one sheet appellee's gross property and plant investment, earnings and dividends annually. Although cash dividends were not withdrawn every year, they were available; and dividends not withdrawn were reflected in property and plant investment—they were used in building up the property (R. 155).

Since 1917 appellee has not earned less than 7.8% on its gross property and plant investment (R. fol. 384).

In 1923, under a rate order which afforded less income than that provided for in order 7080, appellee earned all its operating expenses, all its taxes, its depreciation allowance, its interest on bonds, its dividends on preferred stock and paid 8% on its common stock. After doing all this, it accumulated during the year 1923 a surplus of $73,076.57 (R. 331, 332).

Order 7080 was estimated by Jirgal, appellee's witness, to increase the revenues for 1924 over 1923 by $295,000 (R. 112). City's witness Perk estimated the increase to be $357,256 (R. 333-335).

According to Perk, appellant city's witness, the income available for return under order 7080 would be the equivalent of a return of 13.1% on the original cost of the property less the depreciation reserve invested in the same; 7% on $15,940,903.81, value under order 7080 as of December 31, 1923; 6% on $18,692,503; and 9.3% on $12,000,000, which the appellant city of Indianapolis contends is a fair value of appellee's property for rate purposes (R. 153).

The lower court, adhering to its belief that fair value in rate-making cases is to be determined by giving dominating, controlling and exclusive consideration to but one evidence of value, namely, reproduction cost (spot), depreciated as of the time of the inquiry, found the rate base in this case to be $19,000,000 and held the rates prescribed in order 7080 to be confiscatory (Appendix p. 116.)

STATEMENT OF THE CASE.

The Public Service Commission of Indiana after a hearing, in which the City of Indianapolis participated

(R. 13), approved the order in controversy here, No. 7080, on the petition of the Indianapolis Water Company (R. 10), fixing the value of the appellee Water Company's property at $15,260,400 (R. 29) for rate-making purposes and fixing a schedule of rates (R. 32). Order No. 7080 was approved November 28, 1923 (R. 8), effective January 1, 1924 (R. 32). The Bill of Complaint herein was filed by the appellee, plaintiff below, in the United States District Court for the District of Indiana, December 21, 1923 (R. 1).

Bill of Complaint.

The Bill of Complaint with exhibits is set out (R. 1-34) and alleges, in substance, the jurisdictional amount; that the enforcement of order No. 7080 of the Indiana Public Service Commission would result in a taking of the water company's property without compensation or due process of law and a denial to the water company of the equal protection of the laws, all in violation of the Constitution of the United States and of the State of Indiana. The bill alleges the fair value of the water company's property to be about $18,650,000; that if spot value for 1923 were applied, the fair value on that basis would be more than $22,000,000, and that the schedule of rates provided in order 7080 would give a return on such alleged fair value $18,650,000 of less than 5½%. The prayer was for a perpetual injunction against the Public Service Commission of Indiana; to prevent the enforcement of the order 7080 and the schedule of rates therein prescribed; to prevent interference by the Public Service Commission with the enforcement and collection of a schedule of rates proposed in Exhibit A-1 to the Bill of Complaint; and to prevent the Public Service

Commission putting in force as a rate-making base any value less than $18,650,000 as of November 28, 1923 (R. 1-5).

Answer of Intervening Defendant, City of Indianapolis.

The appellant, the City of Indianapolis, filed a petition for leave to intervene as a party defendant in the cause (R. 36-49), which petition was granted (R. 39). The City of Indianapolis then filed its answer (R. 49 and R. 41-49). The answer alleged, substantially, that order No. 7080 and the schedule of rates prescribed for the water company's service therein greatly increased the revenue of the water company by permitting a charge to be made for service to the city theretofore free, by allowing meterization, by changing the rate for hydrant charges; that the fair value of the used and useful property of the water company was on November 28, 1923, not more than $12,000,000; that the net annual return under Order 7080 would greatly exceed 6% of value of the appellee's property, as found in said order, plus the additions and betterments between May and November 28, 1923; that the reproduction spot value of the appellee's property did not exceed $13,000,000; that the net earnings of the company during the past five years exceeded 7% on the fair value of the used and useful property of the appellee; that the water company after the issuance of Order 7080 notified its patrons and consumers publicly and openly that the water company was not taking advantage of all the provisions of Order 7080 allowing increase in rates and that no change would be made by the water company in the rates of some 40,000 of its consumers which, under the order, might be increased (R. 41-49).

Answer of the Appellant, Public Service Commission of Indiana.

The answer of the appellant Public Service Commission alleged: that the Public Service Commission of Indiana since 1917, but not prior thereto, established rates for the appellee; that the first value fixed by the Commission on appellee's property was in 1917 under Order 1400, the value there found being not less than $9,500,000; that said value was accepted by appellee without objection and that three times thereafter the appellee's petitions for increases were granted and values fixed by adding to the $9,500,000 value of Order 1400, the subsequent additions and betterments; that the schedule of rates allowed in Order 7080 was less than those requested by the water company in its petition; that at the time of the hearing upon which Order 7080 was issued, appellee claimed certain sums were to be shortly expended for additions and betterments, but there was a dispute as to the amount and that such amounts were believed to be far less than $650,000; that the schedule of rates in Order 7080 was the same in respect to flat rate customers that had previously existed, but, that meterization of flat rate customers and thereby an increase over flat rates was allowed by the order; that other changes in respect to charges made available to the appellee a very much increased return; that the value of appellee's property was not more than $15,260,400; that the evidence under which Order 7080 was issued did not show a spot value of $22,000,000; that for the last five years the water company had net earnings in excess of 7% of the fair value of its property (R. 49-55).

THE EVIDENCE.

The Actual Investment of the Appellee in All Its Property, Both Operative and Non-Operative, as Shown by the Books of the Company.

The purchase price (original investment) paid by the appellee at judicial sale for all property, rights and franchises of the Water Works Company of Indianapolis in 1881 was $535,000 (R. 1, 347, 352, 204). The property so purchased was entered in the opening entry of the books of the appellee at $816,061.22 (R. 146-318). Accepting this opening entry as a starting point and ascertaining from the books and records of the appellee (R. 146) and from the Public Service Commission audit, the subsequent annual additions and betterments to December 31, 1923, Perk, witness for the city of Indianapolis, found the total gross investment in, or cost of all the appellee's property and plant, to be $9,195,908.39, city exhibit 48 (R. 318). This total included $583,509.27 charged as capital accounts in the Commission's audit, but shown by the books of the company as charged to operating expenses; and also included $644,749.22 depreciation reserve money invested in property and plant, so that the actual investment in property and plant as shown by the books of the company and exclusive of the depreciation reserve money was $7,967,649.90, calculations shown in city's Exhibit 48 (R. 316, 317, 318).

Appellee's Exhibit as to Investment.

Perk's statement of the actual investment in property and plant as shown by the books of appellee was not challenged. Hagenah, (appellee's witness), in his Exhibit 3 (R. 182), after certain deductions because of "write

ups'' in the books (R. 75, 182), finds the ''specific construction cost'' of plant and property, excluding overheads, to be $9,165,461. The other sums subsequently added by Hagenah to the ''specific construction costs'' in Exhibit 3 (R. 182): $1,374,819 estimated overheads, $2,196,548 appreciation in value of appellee's land, $235,000 estimated working capital, $4,222,328 estimated development costs, were all admitted by Hagenah not to be amounts shown by the books of the company as investments in property or plant, but were the results of calculations made by him because he believed the amounts to be a part of the cost regardless of the books or whether the amounts represented dollars spent.

Total Gross Investment in Property and Plant and Equity in All Other Assets.

The total investment shown by appellee's books and the Commission's audit is $9,195,908.39. Appellee also had an equity in assets as of December 31, 1923 (i. e. excess of current and deferred assets over current and accrued liabilities), in the sum of $49,720.50, making the total investment and equity in assets $9,245,628.89. Exhibit 50 (R. 319).

Money from Stocks and Bonds and Surplus Earnings Invested in the Property.

The money received from the sale of stocks and bonds together with the depreciation reserve and the surplus earnings invested in property and plant corresponds exactly to the $9,245,628.89, the total of investment and equity in assets shown by the books of the company, Exhibit 50 (R. 319, 320). This is tabulated as follows:

A. Investment—Stocks and Bonds to December 31, 1923	$5,177,408.00
B. Depreciation Reserve Invested in Property	644,749.22
C. Surplus invested	3,423,471.67
Total Investment in All Assets to December 31, 1923	$9,245,628.89

This surplus shown in (C) represents the balance remaining in the business after the payment of all operating expenses, taxes, interest and dividends. It is the amount left after bondholders and stockholders had withdrawn in cash, an amount equivalent to an average per annum of 6.4% for the past 42 2/3 years on all the monies invested from all sources in the total gross property and plant (R. 321).

The Book Value and Its Relation to Actual Investment.

The book value of appellee's property is $13,222,283.83. This amount does not represent actual costs but includes in addition thereto (1) a write-up of property and plant account as of March 31, 1909, of $4,154,274.21; (2) a write-up on real estate in 1909 of $47,500; (3) an item for going value of $1,004,000 placed on the books for the first time March 31, 1910; (4) bond discount, commission, exchange and cost of refunding bonds $150,629.73; (5) a write-up of property and plant account, $199,667.91 on account of pavement laid over existing pipe lines subsequent to pipe line construction (a reproduction estimate). These items and write-ups total $5,556,071.85, but there is a write-down on fixed capital accounts of $946,185.14, which reduces the total write-ups to $4,609,886.71. These

total write-ups thus reduced do not represent cost and when deducted from the total book value show the actual cost (i. e. investment) in property and plant to be $8,612,399.12, Exhibit 53 (R. 326).

The Capitalization.

Appellee's total issued and outstanding capitalization is $13,231,000, consisting of $5,000,000 of common stock and $8,231,000 of bonds. Of this amount $4,500,000 of common stock and $3,000,000 of bonds were issued as dividends to the common stockholders, Exhibit 54 (R. 327).

The Tax Value of the Property.

Under the law of Indiana all property of the appellee, tangible and intangible, is required each year to be returned to the Board of Tax Commissioners of Indiana for taxation (Appendix p. 122). The appellee's sworn return in 1923 fixed a true cash value of $10,853,300 on all property, both operative and non-operative (R. 310); and the tax board found the value of all the property to be $12,085,700 (R. 313-314). The company filed a verified return in 1924 of $12,937,100 as the true cash value of all property (R. 314). The above returns were made by appellee after appellant Commission had fixed the value at $16,455,000 in January, 1923, in Order 6613.

Values Fixed in Rate Orders prior to 7080.

The first value of appellee's used and useful property was fixed by the Public Service Commission in 1917 (Order 1400) in the amount of $9,500,000 (R. 215). The second Order No. 3868 in 1918 accepted the previous valuation. The third value was fixed in 1919, Order 4979

in the amount of $9,853,529.08 (R. 149 and folio 382, following p. 326), which value was arrived at by considering value previously found plus additions and betterments minus accrued depreciation. The last value prior to the order in controversy was fixed March 21, 1921, by Order 5798 in the amount of $10,814,000 (R. fol. 382, following p. 326). This value included all anticipated additions and betterments for the entire year 1921. All of these values were fixed for rate purposes and accepted by appellee (R. 350).

The orders above were all the orders fixing values of the used and useful property of the company for rate-making purposes. In an order No. 6613, dated January, 1923, the Commission found the value of all the company's property, operative and non-operative, to be $16,455,000 (R. 219). This valuation was specifically sought by the company, and was found by the Commission, not as a valuation of the used and useful public utility property for rate-making purposes, but as a valuation of the company's entire property, whether used or useful, operating or non-operating (R. 238, 348, 22), for the purpose of issuing securities.

Hagenah's Reproduction Spot Appraisal.

Evidence was introduced to prove what it would cost to reproduce appellee's property, allowing for depreciation, on a basis of spot prices, that is on a basis of labor and material prices on December 31, 1923.

The highest reproduction spot appraisal introduced was that of appellee's witness, Hagenah. The total of this appraisal, present value, was $25,404,026, Exhibit 2 (R. fol. 218, following p. 180). This appraisal contained among other items the following:

Arbitrary 15% structural overhead allowance	$2,962,468 00
The actual amount of overheads shown by the books of the appellee and charged to capital account was $245,335.03, and the amount of overheads charged to operating expenses was $254,635.88, a total of $499,970.91, which total is the equivalent of 5.8% on the total property and plant investment, Exhibit 51 (R. 321-322).	
Accrued depreciation	1,117,589 00
The amount of Hagenah's accrued depreciation is found by deducting the total amount of present value from the total amount of reproduction cost new December 31, 1923, the last items of the last two columns of Exhibit 2 (R. fol. 218, following p. 180).	
Going value	2,000,000 00
Water rights	500,000 00
Working capital	235,000 00
Non-operative property	119,672 00
Additional cost for laying mains in congested districts	240,000 00
An allowance for reproduction of canal in addition to the value of the canal as real estate, including 15% contractor's profit (R. 172-181)	1,232,913 00
Reproduction cost of property constructed by the appellee with funds from the depreciation reserve to the extent of (R. 322)	644,749 22
A reproduction cost of cast iron pipe based on open market prices which exceed the	

appellee's contract prices for quantities of such pipe by more than (R. 71, 337) 435,911 00

Reproduction of all construction work at market quotations rather than at lower contract prices for bulk quantities (R. 71).

A 10% contractor's profit on all construction work (R. 83).....

Elmes' Spot Reproduction.

Appellee's witness, Elmes, showed by his Exhibit 8 (R. 192) a reproduction cost on prices as of December 31, 1923, in the total amount of $22,841,706.

This appraisal included:

Arbitrary 15% structural overheads (R. 192) $2,979,353 00

Capitalization of water rights in the canal in addition to the reproduction cost of the canal (R. 96)..... 250,000 00

Cost of reproducing canal more than..... 1,044,663 00

$1,044,663 was Elmes' cost of reproduction of canal on average prices for 3 years (R. 183, 184), the cost on spot prices would be considerably more.

Cost of cast iron pipe at quotation rather than at contract price for bulk purchases (R. 93), which exceeds contract price more than 435,911 00

Cost of all material used in construction at catalogue prices for single articles rather than negotiated prices for bulk purchases (R. 102).

No allowance for depreciation.

In appraising separate items, Elmes stated that "overhead, construction cost and contractor's profit and all that enters in" (R. 102); in addition the 15% overheads is added to the total cost of construction (R. 192).

Reproduction Cost on a Basis of Average Prices over a Period of Years.

Hagenah submitted appraisals for the three year period ending Dec. 31, 1923, $24,360,358.00; five year period ending Dec. 31, 1923, $25,387,799.00; ten year period ending Dec. 31, 1923, $22,359,354.00.

Appellee's Exhibit 2 (R. fol. 218, following p. 180). These appraisals contained the items heretofore set out as included in Hagenah's spot reproduction appraisal.

Appellee's witness Elmes presented reproduction appraisals on a basis of average prices over different periods of years as follows: Three year average period ending Dec. 31, 1923, $24,370,416.00; five year average period ended Dec. 31, 1923, $25,266,147.00; ten year average period ended Dec. 31, 1923, $22,334,268.00 (R. 194).

The appraisals of Elmes above included the same items heretofore shown to have been included in his spot reproduction appraisal (R. 192) and working capital, water rights and going value in addition. No accrued depreciation being considered in his appraisals.

The Commission's Engineer's Reproduction Cost on a Basis of Average Prices for a Period of Years.

Carter, Commission engineer, (R. 262, 263) submitted reproduction cost appraisals based on prices for the period from 1911 to 1920 as follows:

Operative Property		*Non-Operative Property*		
Undepreciated	Depreciated	Undepreciated	Depreciated	
$14,123.286	$13,330,823	$706,659	$648,921	(R. 262)
14,461,481	13,658,507	706,659	648,921	(R. 263)

Total

Undepreciated	Depreciated
$14,829,945	$13,979,744
15,168,140	14,307,428

Both of these appraisals contained 15% structural overheads (R. 262-263 note). The first appraisal took the average cast iron pipe as a basis for valuation of the pipe instead of the market quotations on cast iron pipe, and the second appraisal used quotations instead of the average cost price at which cast iron pipe could be purchased; this was the only difference in the two appraisals (R. 129).

The appraisals included:

Accrued depreciation of only 6%.

Structural overheads, 15% on all property including land (R. 128, 131).

Cost accumulating right of way of canal, $150,000 (R. 128).

Assumed damage to land above Broad Ripple, $100,000 (R. 128).

Assumed damage to land above Fall Creek, $30,000 (R. 128).

Property constructed with depreciation reserve money, $644,749 (R. 131).

Labor for constructing canal, $1,049,447 (R. 131).

Material and supplies, $100,000 (R. 131).

The City's Reproduction Cost Appraisal.

W. S. Bemis for the city made a reproduction cost appraisal based on the commission engineer's appraisal (Carter's) on average prices for ten year period from 1911 to 1920. Exhibit 60 (R. 337, 341).

The Bemis appraisal, exhibit 60, is an adjustment of Carter's exhibit 33 (R. 263-157) with additions to the property made since the appraisal in Exhibit 33, so Exhibit 60 represents the value of the property to April 1, 1922, on average prices from 1911-1920, and the value of the property acquired since April 1, 1922, at cost (R. 157). To ascertain the accrued depreciation Bemis used the age and life of the various parts of the property as supplied by the appellee's engineer Metcalf (R. 157). This process involved, dividing the number of years of estimated life of any individual item of property into the cost new of the property, the result being the annual depreciation on that item, then by multiplying the annual depreciation by the age in years of the item of property, the accrued depreciation in that item was found. Metcalf, the appellee's consulting engineer for years, recognized this method of calculating depreciation, and his figures for the age and life of the property were used by Bemis (R. 157). From the Commission engineer's exhibit 33, Bemis deducted: the 15% structural overhead on land; the estimated cost of accumulating right of way as one consecutive piece of property; excess calculation by Carter of cost of cast iron pipe; (Carter had found the quotation prices for cast iron pipe for each of the 120 months of his ten year period and had arrived at the cost of the pipe by assuming that the pipe was bought in equal installments whereas much of the pipe had been bought by the company during the months of low prices)

(R. 157-158); the estimated value of that part of the canal which was used only for hydraulic purposes (R. 158). (The court rejected evidence of substitution of cheap pump power for excessively expensive canal property used only for power purposes (R. 159-160).

The Bemis exhibit 60 (R. 337) uses Carter's total of the operating property $14,123,286 (R. 262) as its starting point. To this is added the net additions from April 1, 1922, to December 31, 1923, to bring the total to date. This total is $15,128,781. The annual depreciation on the operative property determined on the basis of age and life is $204,059.25. The total accrued depreciation thus determined is $3,669,473.58. The cost of reproduction new less accrued depreciation is $11,459,307.42. The Bemis exhibit deducts, from the cost new less depreciation, the structural overheads on land and the cost of accumulating the right of way or $521,466.30. This leaves a cost new depreciated in the total of $10,937,841.12. The adjustment for cast iron pipe further reduces the total by an amount of $435,911.55 leaving the cost new depreciated at $10,501,929.57 (R. 337, 338). The method of calculating the depreciation on the straight line, or age and life basis, is set out exhibit 60 (R. 340, 341); the tabulation of cast iron pipe adjustment is set out (R. 342).

Facts Relating to Certain Items Included in the Appraisals of Carter and Those of the Appellee's Engineers: Hagenah and Elmes.

Working Capital.

Hagenah admits (R. 84) that the company had on hands during 1923 nearly twice as much money, from advance payments of customers, as was necessary for its operating expenses. The company is permitted to collect

three months in advance from flat rate users, and does in fact collect three months in advance from about 50 per cent of all its customers (R. 152). All of the appellee's and Commission's engineers make allowance for working capital, either in form of materials and supplies, or cash, or both, and would give the company a return on it. (R. 262, 263, 182, 194).

Structural Overheads.

The appraisals of the Commission's and appellee's engineers as above shown contain a 15% allowance for structural overheads, yet the experience of the company as shown by its books was that from the time the company purchased its plant in 1881 until December 31, 1923, the total structural overheads were $499,970.91 of which $274,279.83 has been charged to operating expense and not to capital. The total structural overheads of the company represented only 5.8% of the actual property and plant investment. Exhibit 51 (R. 321, 322).

The books from 1881 to 1912 show no interest, or no taxes or interest during construction charged to capital R. 148). After 1913 all overheads were charged to capital (R. 322). It appears that the taxes and interest prior to 1913 were paid out of operating expenses and that the property has been built up by piece-meal construction (Hagenah's testimony, (R. 80). Hagenah defines structural overheads as, superintendence during construction, interest, taxes and insurance on property during construction, legal and organization expenses, casualties, contingencies and omissions from inventories (R. 71). Perk also testified that there was no interest charged to capital and no taxes during construction or interest during construction charged to capital (R. 147).

Hagenah found structural overheads totaling $878,335 by going through both the books of the defunct water works company and the books of the appellee, which was an entirely new company purchasing the water works company at judicial sale (R. 80, Rec. 352). The 15% structural overheads was applied to land as well as all other proyerty by Hagenah, Elmes and Carter (R. 80, 183, 128).

Going Value.

There is no evidence of any actual expenditures for going value in this case. There were no charges to capital accounts on the books for development costs (R. 147). Organization expenses of $30,180.95 were shown on the books, exhibit 48, first items right and left side of page (R. fol. 373 following p. 316). Hagenah allows $2,000,000 for going value as a "judgment" figure, and says that, "One of the main factors in going value is that the people using the service give what you call going value" (R. 84-85). Elmes allows $2,098,000 for going value, arrived at by taking the arithmetical mean of two figures representing averages of amounts which are arbitrary percentages of physical property values and amounts which are gross revenues and net revenues (R. 200-201). On March 31, 1910, the company made a "write up" on its books of $1,004,000 for going value (R. 326).

Water Rights.

The appellee made no expenditures for water rights exclusive of land purchased. Exhibit 64 (R. 352 and R. 84). The land was appraised at its fair market value (R. 124). Elmes (appellee's witness) says that the processes of valuing water rights are not well defined

(R. 195). Elmes capitalizes the revenues from the sale of raw water as a partial measure of water rights, obtaining thereby an item of $250,000, although the canal from which the water was sold was entirely reproduced as a part of his appraisal (R. 96), and allows an additional $250,000 for overflow land, making a total of $500,000 (R. 194). The appellee's witness Metcalf fixed the value of water rights at $113,000 in 1917 (R. 209). Hagenah, appellee's engineer, said there was nothing on the books of the company showing anything expended in the acquisition of water rights, aside from land purchases (R. 84). He fixed a value for water rights of $500,000 (R. fol. 218 following p. 180). Carter allowed $150,000 for a theoretical cost of assembling canal land in a continuous strip (R. 128); $100,000 for assumed damages at the Broad Ripple dam and $30,000 assumed damages at Fall Creek dam (R. 128).

Accrued Depreciation.

The age of the Indianapolis Water Company was at the time of the hearing about 42 2/3 years (R. 1, fol. 384 following 328). From April 1, 1909, to December 31, 1923, approximately 15 years, the company charged depreciation to operating expenses in the amount of $1,117,256.98 (R. 324). Hagenah in his highest appraisal, exhibit 2 (R. fol. 218, following p. 180), has a reproduction cost new of $26,521,615 and a present cost of $25,404,026, the difference between the two, $1,117,589, representing Hagenah's total assumed depreciation for the entire property down to December 31, 1923. Elmes does not find depreciation, but estimates that for $443,044 he could put the property in 100% operating condition (R. 98). The Commission's engi-

neer, Carter, does not show accrued depreciation but indicates that the difference between total reproduction cost and total present cost might be considered to be accrued depreciation in his appraisals. His ten-year average appraisal thus showing only $850,00 accrued depreciation (R. 129, 130). W. S. Bemis using the age and life of the property, or the straight line method, and accepting the ages and life of the various items of property as submitted by the appellee's engineer (Metcalf) obtains an accrued depreciation of

Before adjustments	$3,669,474
After adjustments	2,996,294

(R. 157 and 337.)

These amounts are determined by subtracting the third column from the first column (R. 338). Hagenah determined existing depreciation by an inspection and sinking fund method (R. 79).

Per Cent Condition.

Appellee's witness, Hagenah, finds hydrants, services and pipes in approximately a 96% condition (R. 78, 79, 80). These three items shown in his Exhibit 2 (R. fol. 218 following 180) constitute nearly half of the entire physical property. Carter finds the property as a whole to be in 94% condition with "only 6% of the property life exhausted" (R. 130). Bemis' depreciation ignores an apparent present per cent condition as determined by inspection and accepts the theory that if the life of an item of property is 80 years and the item has been in use ten years, 1/8 of its service value will be exhausted although it appears from inspection to be practically as good as new, illustrating the point with the life of an

electric bulb which is 100% efficient up to the minute it became utterly worthless (R. 157-164). Metcalf (appellee's witness) recognizes the life and age method of determining depreciation (R. 144).

The Canal.

The canal, completed in 1839, was constructed by the State of Indiana for transportation purposes. It is 8.7 miles long and about 9 feet deep (R. 271, 272). This canal came into possession of the old water works company and was purchased by the appellee as a part of the property, the total consideration for which was $535,000.

The Commission's engineer appraised the canal land at $1,690,070 and the cost of constructing the canal at $1,049,447, or a total of $2,739,517. In appraising the canal as land he used the adjacent land values and in constructing the canal he assumed the same physical conditions to exist that existed at the time the canal was dug (R. 131).

Hagenah reproduced the canal in his appraisals because he found it. He understood the canal was a state enterprise and that the appellee did not construct it. He did not know whether the canal was purchased by the appellee at a higher rate than would have been paid under condemnation proceedings at the time of the acquisition by appellee. He would reproduce a canal but not a natural stream; yet in case a canal were in existence, useful for a utility, he would not construct another canal, but buy the existing one at the best possible terms. The canal was appraised as land at the market price and then the construction cost was appraised and added (R. 90). Hagenah's Exhibit 1 (R. 172) shows construc-

tion cost of the canal as $1,072,098, to which is added 15% contractor's profit (R. 181), making a total canal construction cost of $1,232,918.

Appellee's witness Elmes shows a total construction cost of the canal of $1,044,633 (R. 184); he uses the land appraisal of the company's appraisers for the value of the canal land, $1,222,880 (R. 261), or a total of $2,267,513. He capitalizes a part of the commercial use of the canal, the sale of raw canal water, at $250,000, and adds that to the land cost and reproduction cost in arriving at the value of the canal (R. 96). The canal was entered on the books of the company in 1881 at $50,000, Exhibit 44 (R. 296), and carried at that value until April 1, 1909, when it was written up to $1,773,874, Exhibit 44 (R. fol. 354, following p. 298).

Order 6613.

This order was issued January 2, 1923 (R. 216), by appellant Public Service Commission upon the application of the appellee to fix a valuation for the purpose of issuing securities (R. 221). The application was not made to obtain rates and the order did not fix a value for rate-making purposes, consequently no attempt was made by the commission to discriminate between operative and non-operative property, although the principle which would require such discrimination to be made in a valuation for rate-making purposes was recognized and the Commission in the order said that of the total property a million dollars or more would be of questionable character if the value being found were for rate-making purposes (R. 238, 239).

In fixing the value the Commission adopted its engineer's appraisal No. 1 for the physical property (R.

240, 224). This appraisal was based on prices for the ten-year period, 1912-1921, and was $14,689,000. To this was added by the Commission capital additions at cost, from April 1, 1922, to October, 1922, $215,000, giving a total physical property of $14,904,000, and to this was added 9½% for going value and water rights and $135,000 for working capital, making the total value found by the Commission $16,455,000 (R. 242).

Carter, the engineer, testifying during the trial was the engineer furnishing the appraisal which the Commission used in Order 6613 (R. 228). This appraisal is the same as Carter's Exhibit 33 (R. 262), except that Exhibit 33 is based on 1911-1920 prices instead of 1912-1921 prices. Carter's Exhibit 33 changed to 1912-1921 prices is $14,689,000, the appraisal used by the Commission in Order 6613 (R. 132).

Since the appraisal used by the Commission in Order 6613 is the same as Exhibit 33, except as to average price, it is ascertained from Carter's testimony relating to Exhibit 33 that the Commission's appraisal contains the following items: Structural overheads, 15% on total physical property, including land and excepting materials and supplies (R. 262); $150,000 for accumulation of canal right of way on the theory that the land would have to be put in a continuous strip; $100,000 assumed damages to land above Broad Ripple dam; $30,000 assumed land damage at Fall Creek if a dam were to be built (R. 128); property constructed with $644,749 from depreciation reserve; labor for constructing the canal $1,049,447; material and supplies $100,000; only $850,000 accrued depreciation (R. 131). In addition to this, Order 6613 allows $1,416,000 going value and water rights and $135,000 working cash capital.

Non-Operative Property.

The Commission in Order 6613 thought there was about $1,000,000 non-operative property; Carter finds $648,-921 as the present value of non-operative property on 1911-1920 prices (R. 263), Hagenah a little over $100,-000 (R. fol. 218, following p. 180). In 1910, three years before the Public Service Commission Law of Indiana was passed, the appellee in making a mortgage excluded the office site and 64 or 65 acres of land on the ground that a public utility commission would not regard such property as used and useful (R. 291). The office land and buildings are appraised at $373,799 (R. 268).

Net Earnings and Their Disposition.

From its organization on April 23, 1881, to January 1, 1924, 42 2/3 years, the appellee has paid out in cash as dividends on stock to its stockholders and as interest on dividend bonds issued to its stockholders $10,831,685.82 (R. 328). In addition to these cash payments the company has paid its stockholders bond dividends of $3,-000,000 from earnings, and stock dividend of $4,500,000 out of surplus created by a "write-up" of its assets (R. fol. 382, following p. 328).

Earnings.

The appellee has never since its organization earned less than 6.1% annually on the total actual cost of all its plant and property and has earned as much as 10.4% on such cost. In 1922 it earned 10.1% and in 1923 10% on the total cost of all its property and plant, and the average annual earning for 42 2/3 years was 8.6% on such total property and plant (R. fol. 384, following p. 328). In 1923 the company earned all of its oper-

ating expenses, all taxes, including income tax, depreciation allowances, fixed interest and dividend charges, paid 8% on its common stock and had a surplus of $73,076.57. Exhibit 58 (R. 331, 332). In 1922 the record shows practically the same (R. 331, 332).

Under Order 7080, the one in controversy, appellee's witness estimates that there will be an increase in earning in 1924 over 1923 of $295,000 (R. 112). The city's witness estimates the increase in earnings for 1924 over 1923, under Order 7080, will be $357,000 (R. 152). This last estimate is based on the actual earnings of the appellee for the first three months of 1924 under the rates provided in Order 7080.

The Company's Acceptance of Previous Rate Orders.

Prior to Order 7080 four orders fixing the appellee's rates had been approved by the Commission. The first rate order was No. 1400 (approved 1917), fixing the fair value of the used and useful property at not less than $9,500,000 (R. 215). The last rate order prior to 7080 was Order 5798 (approved March 31, 1921). It fixed the fair value of the used and useful property at $10,814,000, which figure contained all the estimated capital expenditures for 1921 (R. fol. 382). By adding net additions and betterments for 1922 and 1923, which totaled $988,250.62, the value becomes $11,802,250.62. These orders were accepted by the company without raising any legal question as to the propriety of the orders although Mr. Metcalf, engineer for the company, believed them too low to be fair and advised with respect to Order 1400, the $9,500,000 valve, that such order was inadequate in valuation, consideration being given to betterments which would be required in the future (R. 134, 135).

Return Under the Rate Orders Issued Prior to 7080.

The appellee had available for return on the value as found by the Commission in the four rate orders above, in 1917, 5.88%; in 1918, 5.64%; in 1919, 6.51%; 1920, 6.82%; 1921, 7.45%; 1922, 7.95%; 1923, 8.27% (R. 328).

The appellee earned a return on its gross property and plant investment in these same years as follows:

In 1917	8.1%
In 1918	7.8%
In 1919	8.8%
In 1920	9.0%
In 1921	9.6%
In 1922	10.1%
In 1923	10.0%

(R. fol. 384, following p. 328).

Increase in Customers and Income Available for Return.

The company had an increase in customers of 28.5% since 1920 (R. 329) and an increase in income available for return in the last seven years, 1917-1923, of approximately 62% (R. fol. 387, following p. 328). The increase in income available for return for 1922 over 1921 and for 1923 over 1922 was sufficient in each of those years to pay 7% on over $1,000,000 (R. 330). The additions and betterments for 1922 were $300,470 and for 1923 were $851,381 (R. 330). The increase in income available for return for those two years was sufficient to pay over 12% annually on the average additional investment in plant and property for those two years. Metcalf, appellee's witness, said the increased income each year was sufficient to pay a big return on additions and betterments but said he didn't think it followed that the

increase in income resulted entirely from additions and betterments (R. 135-137).

Estimated Return for the Year 1924 Under Rate Order 7080.

Perk, witness for the City, made an estimate of the gross revenues for 1924 based on the actual return for the first three months of 1924. The revenues of the first three months of 1924 were assumed to bear the same proportion to the entire revenues for 1924, that the revenues for the first three months of 1923 bore to the total revenues of 1923. This was somewhat less than 25% of the annual revenues or 23.98% of the total revenues for 1923. He also estimates the operating expenses for 1924 on the same basis and then includes income tax, an increase in tax due to additions and betterments, showing an increase of nearly $156,000 in operating expenses in 1924 over 1923 (for 1923 operating expenses see R. 332). The net revenue available for return in 1924 was estimated to be $1,121,000, which affords a 6% return on a value of $18,692,000, a 7% return on the value in Order 7080 and 9.3% on a value of $12,000,000 and 13.1% on the original cost of all property less depreciation reserve invested in same (R. 333-334).

Jirgal, witness for appellee, estimated an increase in gross revenues for 1924 over 1923 of $295,000. He found the increase in revenues for the first three months of 1924 to be $81,226 more than for the first three months of 1923 (R. 112). The meter consumption for the first three months of 1924 would be less than one-fourth the meter consumption for the whole year and his figure, he said should be modified accordingly and approximately

$91,000, would represent less than one-fourth of the revenue for 1924 (R. 113, 114).

Metcalf, witness for appellee, prorated the first three months of 1924 and estimated operating revenues for 1924 $2,091,000 on that basis (R. fol. 300, following p. 248). This estimate was less than Jirgal's (R. 117). Metcalf forecasted a return of 5.2%, 6.5%, 6.8%, for the years 1924, 1925, 1926, Exhibit 28, following (R. 256). This per cent was based on what Metcalf called the "I. P. S. Com.," or the Indiana Commission's rate basis, in the exhibit, but in his oral testimony he said that he did not know what the Commission's rate bases were and that to the extent the rate base in the exhibit did not reflect the Commission's rate base, it was erroneous (R. 141). It finally appears (R. 142) that the "I. P. S. Com." rate bases used in Exhibit 27 were not the rate bases of the Commission but calculations made by the witness himself and that the assumed valuations there were something of a theory. The witness then states that if he had used the Commission's rate base instead of his calculations, which he called "I. P. S. Com. rate base," his return on those bases in 1920 would be 6.4% instead of 5.1% shown in the exhibit, and in 1921 would have been 7.1% instead of 5.3% shown in the exhibit.

Metcalf, using rate bases for which he says appellee is contending, estimates a return of 4.8% on $18,641,000 in 1924; 4.9% on $19,800,000 in 1925; 5.2% on $20,684,000 in 1926.

Metcalf makes a financial forecast using the same rate bases he used in Exhibit 27. Assuming a fair rate of return to be 8% until 1923 and 7% thereafter, he finds that there is a deficiency in net annual return for the

years 1917 to 1923 of $2,038,000, and that during that period the net annual return averaged 5.4% on his assumed rate bases, Exhibit 28 (R. fol. 306, following p. 256). Metcalf did not use the Commission rate bases nor the exact rates of return in reaching his conclusions in Exhibits 27, 28. What he says in respect to Exhibits 27 and 28 is: "The inference does not follow in my calculation that I do not accept any of the rate orders laid down by the Commission as being in fact fair. What I have done is merely to take a certain index which seemed to me might have been helpful" (R. 143). In making the calculations and speculations in Exhibits 27 and 28 Metcalf used an estimated annual operating expense for 1924, Exhibit 23 (R. fol. 301, following p. 248). In this table of operating expense is included a $25,000 annual charge for amortization over five year period of the expenses of the three rate hearings and suits of 1923, the total cost being $174,072.

Dissenting Opinion in Order 7080.

The dissenting opinion of Messrs. Wampler and Artman, Exhibit 64 (R. 345-367), contains an analysis of facts on which the majority opinion was rendered, and after eliminating items from appraisals which were regarded as improper because having no basis in the history of the company fixed a total fair value of $12,000,000 for appellee's property.

The Post Card.

In December, 1923, some time after the Order 7080 herein was approved and before the suit in this case was begun, public statements and letters were sent out in relation to the company's public policy. A post card was sent by appellee to 40,000 or more of its flat rate

subscribers (this card was sent to all the flat rate consumers excepting those coming under the $9.00 minimum prescribed by the Commission) (R. 166). It stated that the water rates of those consumers had not been increased; that the appellee desired to furnish its customers with the real facts in the recent order of the Public Service Commission; that more than 40,000 consumers were not affected in any way by the order, and that "your rate remains unchanged" (R. 345).

Other Statements in Respect to the Excellent Condition and Prosperity of the Appellee.

In June, 1923, Metcalf, engineer, who had for many years outlined the development program of the appellee, stated in an address "that the general condition of property and standard of service is excellent." He testified that he recommended to the appellee, after Order 7080 was approved, an extension and development which would amount to $1,000,000 within the next year; that during the war period the margin of safety could not be kept up because capital was not available, but the service had been of very high standard and since the war has been good; that insurance rates in Indianapolis had been lowered partly because of testimony of the water company's officials as to conditions of the water property and service (R. 143, 144). Hagenah, appellee's witness, testified that he had known for a long time that the Indianapolis Water Company was generally regarded as one of the successful and profitably operated utilities in the United States and that it had always been regarded as a property of good credit. He also said that while the company had not always been successful that it was considered to have been successfully and profitably oper-

ated during the war period and during the period it was under Commission regulation (R. 77).

Indeterminate Permit.

The appellee in 1922 received an indeterminate permit under the law of Indiana (R. 144).

SPECIFICATION OF ASSIGNED ERRORS URGED IN THIS COURT:

The appellants, defendants in the court below, made three specifications in their assignment of error. Appellants urge, in this court, that the court below erred as set out in each specification and they urge here each of the assigned errors, which are as follows:

I.

The said court erred in sustaining the bill, adjudging the Commission rate order number 7980 unconstitutional and enjoining the enforcement of the same, said order not being unreasonable, confiscatory and unconstitutional or in violation of the Constitution of the United States or that of the State of Indiana, as a taking of complainant's property without compensation.

Note: Art. 1, Sec. 66 of the Indiana Constitution, provides: "No man's particular services shall be demanded without just compensation. No man's property shall be taken without just compensation; nor, except in the case of the State, without compensation first assessed and tendered."

II.

Said court erred in its decision and decree in reference to the valuation of the utility's property for the purpose of the inquiry, in the following particulars:

(a) In adopting reproduction cost new depreciated on a basis of spot prices, as of January 1, 1924, as the measure of the fair value of the property.

(b) In adopting reproduction cost depreciated (spot) as a dominant and controlling measure of fair value.

(c) In excluding from consideration: Reproduction cost appraisals on bases of prices for various periods of years; original cost; tax valuation; capitalization; book value; financial history; earnings; operating expenses; valuation fixed by the Commission in 1917, which with subsequent additions and betterments at cost was accepted by the company, each year after 1917 and until 1923, as a fair value of the utility property.

(d) In adopting as a measure of fair value a reproduction cost spot estimate, which included obsolete, non-useful and non-operative property; 15 per cent structural overheads on all property, including land; reinvested depreciation reserve money; cost of accumulating right of way of canal built by the State; cost of reproduction of canal built by the State long prior to the existence of the water company; only a small deduction for accrued depreciation, a large amount having been collected annually for depreciation by the company and much of the property being very old; water rights, though none had been purchased by the company aside from the land purchase; materials, supplies and working cash, when in fact the company's advance collection of water rates more than supplied in advance the amount necessary for these items; prices for construction materials on the basis of spot prices for individual items and not on basis of bulk purchase at negotiated prices; overheads and capital charges, which on the books of the company had been charged in whole or in part to operating ex-

penses and collected from the consumers; hypothetical costs or expenses which might occur in some cases, but which, if the experience of the company in production had been repeated in reproduction, would not be incurred; expenses attributable to a theoretical reproduction of the entire plant at one time, which did not occur in the original piece-meal construction of the water company's plant and would not again occur in building and developing anew the plant and business.

(e) The valuation adopted is consequently very excessive in that it exceeds original cost by $11,000,000; exceeds the valuation of order number 1400, plus subsequent additions and betterments at cost of January 1, 1924, by $7,197,749; exceeds capitalization by $5,769,000; exceeds book value by $5,778,000; exceeds reproduction cost on a basis of prices for a period of ten years, 1911 to 1920—when consideration is properly given to accrued depreciation and to the possibilities to advantageous bulk material purchase by contract and to the elimination of hypothetical and non-existing intangible charges—by $8,060,158; exceeds the tax value verified and submitted by the water company to the Indiana State Tax Board for the year 1923 by $8,146,700; exceeds the tax value verified and submitted by the water company to the Indiana State Tax Board for the year 1924 by $6,062,900; and exceeds the tax value as found by the Indiana State Tax Board in 1923, for taxation purposes, by $6,914,300.

III.

The court erred in sustaining the motion of the complainant water company to strike out evidence introduced by Walter S. Bemis, witness called on behalf of the city of Indianapolis, which evidence in substance is: That the

canal property in question, from Holton Place to Washington Street Station, together with land equipment and buildings at the station, are used and useful only to develop hydraulic power at the Washington Street Station, except for some incidental storage use of the pump room. The 1911 to 1920 reproduction cost new of these items, less depreciation, is $1,396,170.54, as shown by Carter's ten-year average appraisal. This value is too excessive to require the consumers to pay a return on it, since its only use is for hydraulic power which should be substituted by a steam-pumping equipment. Considering the cost of a steam-pumping equipment as a substitute for the hydraulic power, the increase of cost of operation in steam-pumping and the cutting down of taxes by the substitution, the gross results of substitution gives a total capitalized saving of $1,073,639.63 on a basis of cost new of the hydraulic power, or $785,013.11 on a basis of cost new of the hydraulic power, less depreciation. (R. 67-69).

SUMMARY OF POINTS AND AUTHORITIES.

1. Reproduction cost spot depreciated at the time of the inquiry is to be considered in determining fair value, but it is not, as held in the opinion of the lower court, the dominant or controlling measure of it.

Smyth v. *Ames*, 169 U. S. 466, 546, 547;

Minnesota Rate Cases, 230 U. S. 352, 434, holding:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Brooks-Scanlon Corporation v. *U. S.*, 265 U. S. 106, 125;

Bluefield Water Works Co. v. *Public Service Commission*, 262 U. S. 679, 689;

Georgia Railway and Power Co. v. *R. R. Commission*, 262 U. S. 625, 629;

Brooklyn Borough Gas Case, P. U. R. 1918 F. 335 (ex-Justice Hughes sitting as referee);

Waukesha Gas & Electric Co. v. *Wisconsin R. R. Commission*, 194 N. W. 846;

4 R. C. L. 639.

2. The Commission in determining fair value was entitled to exercise an independent judgment upon all the relevant facts and was not required by any rule of law to give exclusive, controlling or dominating effect to any one kind of evidence of value.

Smyth v. *Ames*, 169 U. S. 466;

Galveston Electric Co. v. *Galeston*, 258 U. S. 388;

Georgia Railway & Power Co. v. *R. R. Com. of Georgia*, 262 U. S. 625;
Minnesota Rate Cases, supra.

3. The Commission did not disregard the engineers' estimates of spot reproduction cost. No less than $3,626,833.44 was allowed for appreciation in value occurring after March 21, 1921, and the estimates of spot reproduction was the only evidence in which the allowance for appreciation could rest. In giving such estimates the weight indicated by the appreciation figure the Commission acted well within its powers as a fact-finding body, and the lower court was powerless to set aside the finding on the ground that insufficient controlling effect was given to these estimates. The value fixed by the Commission was fair and the schedule of rates ordered by it were sufficient to provide a fair return on the said fair value. The Commission's order would not operate to confiscate appellee's property and hence the judgment below should be reversed.

Public Utilities Com. of Dist. of Col. v. *Potomac Electric & Power Co.*, 261 U. S. 428, 444;
See Argument, *post* p. 59.

4. The appellant City contends that the Commission's valuation of $15,260,400 was excessively liberal, but if it were the *minimum value* under the evidence, which a fair-minded board found it possible to reach, it should still be sustained, since legislative power implies discretion.

San Diego Land & Town Co. v. *Jasper*, 189 U. S. 444;
Van Dyke v. *Geary*, 244 U. S. 39;
Minnesota Rate Cases, 230 U. S. 352, 433;

Public Utilities Commission of District of Columbia v. *Potomac Electric & Power Co.*, 261 U. S. 428, 444.

5. Before the appellee's charge of confiscation can be sustained, the evidence must be such as to compel a conviction that the rates complained of are inadequate.

Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 401, holding:

"Every element upon which his prophecy should be based, received careful consideration. We cannot say the evidence compelled a conviction that the rates would prove inadequate."

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19, 41;

Minnesota Rate Cases, 230 U. S. 352, holding that:

"The constitutional invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts must be proved, and this is true of asserted value as of other facts."

San Diego Land & Town Co. v. *National City*, 174 U. S. 754;

Knoxville v. *Knoxville Water Company*, *supra*;

Darnell v. *Edwards*, 244 U. S. 564;

Northern Pacific R. R. Co. v. *North Dakota*, 236 U. S. 585;

Railroad Commission of Louisiana v. *Cumberland Tel. & Tel. Co.*, 212 U. S. 414;

Illinois C. R. Co. v. *Interstate Com. Com.*, 206 U. S. 442, 454;

C. H. & D. R. R. Co. v. *Interstate Com. Com.*, 206 U. S. 142.

6. Reproduction cost appraisals are of service in ascertaining present value when reasonably applied, but when the appraisals depend on hypothesis and conjecture or on disputed questions of fact as they do in this case the hypothesis and conjecture must be shown to be reasonable and not contrary to fact; and the disputed questions of fact must be proved in accordance with the contention of the appraisals before the constitutional invalidity, of the valuation or rate attacked, can be held to be proved thereby.

Minnesota Rate Case, 250 U. S. 352.

7. A rate will not be held confiscatory by incorporating, in the reproduction cost, items which are entirely hypothetical and theoretical and have not in fact entered into the actual cost of the utility's property, as was done in this case.

Minnesota Rate Case, 250 U. S. 352;
Des Moines Gas Co. v. *Des Moines*, 253 U. S. 171, 172 (theoretical paving);
Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 397 (hypothetical brokerage fees);
Winona v. *Minn. Light & Power Co.*, 276 Fed. 996, 1005.

8.(a) The principles above, when applied, eliminate from the reproduction cost appraisals in this case, the following items among others: 15% structural overheads to the extent they are in excess of actual overheads; the cost of construction of the canal (which is appraised in addition to giving the canal value as land at the present prices), the canal having been constructed by the state long before the water property was constructed and

being an existing geographical and topographical condition when the original construction of appellee's property was begun; paving not done; construction in congested districts never done; water rights which were not purchased independent of land (the land having been given market value); working capital which was not furnished by the appellee but came from advance payments made by flat rate customers; 10 to 15% contractors' profits which were never incurred because original construction was "piece-meal" under regular employes and regularly employed supervision; a large portion of the $2,000,000 going value (only a small development or initial going cost was originally incurred); and appraisal prices at catalogue or market quotations, insofar as they exceeded the prices at which the parts of the property could be purchased under contract price for large quantities.

8.(b) Structural overheads on land are not allowed in reproduction where the land is valued at market prices.

Minnesota Rate Case, 230 U. S. 350, 455.

9. Property originally constructed from depreciation reserve money should be excluded from all appraisals and valuations for rate purposes, the depreciation reserve money not being subject to capitalization. (The depreciation reserve money so invested was $644,749, but the property purchased with that money was enhanced 100% in the appellee's and Commission's engineer's appraisals.)

Section 25, 1913 *Indiana Acts*, 167 (*Appendix* p. 119);

Railroad Commission of Louisiana v. *Cumberland Telephone Co.*, 212 U. S. 414, 424.

10. Going value, if it exists as an actual or initial cost of getting the business into operation and if the cost is

proved, is to be valued; but neither good will, nor hypothetical going value, nor actual expenditures incidental to the experimental stage and which may have been compensated in rates previously charged, are to be valued for the purpose of determining whether a rate order is confiscatory.

Des Moines Gas Co. v. *Des. Moines*, 238 U. S. 153, 164-166;
Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 396-397.

11. Depreciation when computed for reproduction should include obsolescence, inadequacy, physical deterioration in age and use, and should be based on the figures of reproduction.

Kansas City v. *United States*, 231 U. S. 451;
Nashville Ry. Co. v. *United States*, 269 Fed. 251, 255, (*contractors' profits denied*, 255 U. S. 564);
7 I. C. C. 443, 553.

12. The theory, adopted in this case by appellee for calculating depreciation in reproduction appraisals—which denies the existence of any relation between accrued and a large annual depreciation (after accounting for a small per cent of renewals and replacements) which employs the inspection method, or apparent operating condition method, of determining the extent of the depreciation and excludes consideration of the age and life of the property, and the inevitable deterioration and liability for exhaustion of service which have accrued—is unsound.

Minnesota Rate Case, 230 U. S. 350, 456, 457;
Knoxville v. *Knoxville Water* Co., 212 U. S. 1;
Lincoln Gas Co. v. *Lincoln*, 223 U. S. 440, 449.

13. Costs of litigation in rate hearings here involved which are charged to operating expenses need not be taken into consideration in determining whether a rate is confiscatory.

Winona Light & Power Co., 276 Fed. 996, 1005;
Spring Valley Water Works v. *San Francisco*,
192 Fed. 137, 190.

14. (a) The Indiana Law required the Appellee to file a verified statement annually between March 1 and April 1, setting out the name and value of each franchise and privilege and a schedule of property intangible and tangible with a statement of the true cash value of the same (1919 Indiana Acts 243. Appendix p. 122).

14. (b) The tax returns to the Indiana Tax Board verified by the appellee, were proper matters for consideration in coming to a decision whether the action of appellant Public Service Commission was fair in arriving at a fair value of appellee's property.

San Diego Land and Town Co. v. *Jasper*, 189
U. S. 439, 443.

ARGUMENT.

Brief History of Appellee and Its Rate Orders.

The appellee in 1881 purchased at judicial sale the plant of the Water Works Company of Indianapolis. The price paid was $535,000, but the property was entered on the books at $816,061.22. Since that time additions and betterments have been made bringing the appellee's total investment on December 31, 1923, to $9,195,908.39.

In 1917 the appellant Public Service Commission valued the appellee's used and useful property at $9,500,000. The total investment at that time in all its property was $6,927,793.17. In 1918 the Commission said the value of 1917 was liberal and should not be disturbed; at that time the appellee's total investment was $7,024,496.17. In 1919 the Commission allowed a rate base of $9,853,529.08; at that time the actual investment of the Appellee was $7,222,061.88. In 1921 the rate base allowed by the Commission was $10,814,000; at that time the total investment of appellee was $8,044,056.74. The values above were accepted by the appellee without appeal or request for rehearing. In 1923, in the order here in controversy (7080) the Commission fixed a rate base of $15,260,400, which included $980,000 for going value, water rights and working capital. The total investment of appellee was at that time $9,195,908.39.

The Commission was divided on Order 7080, three to two, the majority finding a $15,260,400 value and the minority in a strong dissenting opinion, Exhibit 64 (R. 345), fixing a value of $12,000,000 (R. 366).

The appellant City appeared in opposition to the appellee in the hearing in which the value in Order 7080 was determined. The order was approved on November 28,

1923, and became effective January 1, 1924 (R. 32). About December 1, 1923, before the order went into effect the appellee sent out communications to its customers or 40,000 of them seeking to explain and justify Order 7080, (R. 166), exhibit 63 (R. 345).

Shortly thereafter the appellant city filed a petition with the Commission asking a rehearing and a revision of Order 7080, a proceeding preliminary, under the Indiana Law, to seeking a modification of the order through the state courts. Almost immediately after appellant City's petition for rehearing was filed and before it was acted on by the Commission, the appellee filed its bill of complaint herein in the Court from which this appeal is pursued.

Is There Any Rule of Law by Which One Kind of Evidence of Value May Be Considered to the Exclusion of All Others in Determining Fair Value?

The above question is presented directly by the opinion of the trial court which holds that spot reproduction cost as of the time of the injury, is the dominant and controlling measure of the value for rate-making purposes. The practical application by the lower court of the theory of the dominance or primal character of spot reproduction cost as of the time of the inquiry resulted in a valuation by that court which accepted a spot reproduction of January 1, 1924, (the time of the inquiry), as the exclusive measure of fair value.

There are expressions at various places in the opinion which standing alone might leave some doubt as to whether the lower court intended to adhere to spot reproduction as the exclusive measure of fair value, but the express ultimate conclusion in the opinion as to the fair

value of the property leaves no doubt that the court intended to and did accept the spot reproduction cost as of January 1, 1924, as the exclusive measure of fair value.

Quoting the opinion:

"I am entirely content to accept the characterization made by the judges in the Sixth Circuit in the so-called Monroe Gas case; that the necessary implication from their results" (the results of the Missouri Bell Telephone, the Georgia Power and the Bluefield cases), "is that dominating consideration should be given to evidence of reproduction value and, if that means anything, it means that evidence of reproduction value spot at the time of the inquiry must be considered as evidence of a primarily different character from either of the other three kinds of evidence", (R. 58), (evidence of historical cost, prudent investment, and reproduction cost on average price levels for different periods), "I am entirely confident that the case in its ultimate disposition brings us to an exceedingly narrow compass of evidence . . . I might say, now, it follows, as a matter of necessity, that evidence on other contentions in the case, particularly all of the contentions made here in behalf of the intervening city, are either wholly eliminated or cannot be retained, to have any probative value in the case which will alter the conclusion," (R. 59), (the city had introduced evidence, of actual investment, of capitalization, of earnings, of book cost, of tax valuation made by the company, of reproduction cost on a basis of average prices from 1911 to 1920, plus additions and betterments since 1922 at cost, and evidence of reproduction cost based on other appraisals in evidence, but eliminating from those appraisals hypothetical and assumed costs for which the record of the appellee showed no basis).

After stating that appellee (Complainant) had submitted a spot reproduction cost of about $25,000,000 and the Commission's engineer Carter had furnished a spot reproduction value of about $19,000,000, the lower court says:

"Now I could say if the problem were before the Court to consider those ranges of the evidence bearing upon that one kind of reproduction value" (spot) "that there is a field of arbitration between them" (R. 63). "I am not confronted with the problem of fixing a valuation within the range of dispute upon spot reproduction. I say I am not confronted with that problem because the complainant comes into court and offers to accept $19,000,000 as a fair basis of valuation . . . that will be the finding." (R. 64).

Carter, an Engineer for the Commission, had as the court said (R. 63), furnished a spot reproduction cost appraisal, as of the time of the inquiry of approximately $19,000,000.

The opinion of the lower court accepted Carter's spot reproduction cost as the dominant and exclusive measure of value on the theory that the "Missouri Telephone case," the "Georgia Power case", and the "Bluefield case" made spot reproduction the dominant and exclusive measure of value. But appellants urge that the results arrived at in these cases do not compel or suggest the conclusion that reproduction cost must be a dominant, controlling or exclusive measure of fair value, regardless of circumstances.

The Three Cases Briefly Analyzed.

(1) In the case of *Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission* of

Missouri, 262 U. S. 276, before the Commission, the estimates of value of Appellant's property were:

(1) Actual cost shown by company's books	$22,888,943
(2) Reproduction cost new by company's engineers	35,100,868
(3) Reproduction cost new depreciated by company's engineers	31,355,675
(4) Company's figure (3) reduced by Commission to the level of its former appraisal on part of the property. (This estimate is based on 1913 prices for 90% of the property)	20,400,000
(5) Adjusted original cost	20,456,000

The Commission adopted a value of $20,400,000 for the telephone property.

This court said: The valuation should be "at least $25,000,000." This amount was $6,355,675 less than the reproduction cost new depreciated as appraised by the company (3) and is only $2,111,057 more than the actual cost shown by the books (1). To put it otherwise, the court's $25,000,000 value was only about 10% higher than the actual cost (1) and was about 20% less than reproduction cost new depreciated (3). This would indicate, if any general rule may be deduced from the percentages in the case, that more weight is to be given actual cost than is given to reproduction cost new.

The Commission's value of $20,400,000 (4) was based on previous appraisals on parts of the telephone property. One of these partial appraisals was made in 1913 and was for $8,500,000; one was made in 1914, $25,000; and one in 1916, $815,000, a total of $9,340,000. It is noted that through the use of these early appraisal figures

as a basis for revising the company's reproduction cost new (3) and arriving at a $20,400,000 value (4) the Commission was actually applying 1913 prices to more than 90% of the total telephone property.

This court said of such method: "Obviously the Commission undertook to value the property without according *any weight* to the greatly enhanced cost of material, labor and supplies over those prevailing in 1913, 1914, 1916," but "any weight" is not synonymous with dominant, controlling or exclusive weight, and this also appears from a comparison of this court's figure of $25,000,000 with the estimate based on 1913 prices (4). The $25,000,000 figure is $6,335,675 less than reproduction cost new, less depreciation (3) and only $4,600,000 more than the estimate on 1913 prices (4).

It should also be noted that the Commission's order failed to provide rates high enough to afford a fair return on even the actual investment.

(II) In the case of *Bluefield Water Works and Improvement Company* v. *Public Service Commission of West Virginia* et al., 262 U. S. 679, the following estimates of value were before the Commission:

(1)	Reproduction cost new less depreciation pre-war prices, company's Engineer..	$ 624,548.00
(2)	Reproduction cost new less depreciation on 1920 prices, company's Engineer...	1,194,663.00
(3)	Present fair value for rate-making purposes, testimony of company's Engineer	900,000.00
(4)	Reproduction cost new less depreciation on 1915 prices and plus additions since 1915 at cost and excluding Bluefield Valley Water Works water rights and going value, Commission's Engineer...	397,964.38

(5)	Investment cost less depreciation, Company's statistician	365,445.13
(6)	Valuation as filed in commission case 368 ($360,000), plus subsequent gross additions to capital ($92,520.53), Commission	452,520.23
(7)	Gross investment undepreciated, Commission	500,402.53

The Commission fixed a rate base of $460,000 which was $40,000 below actual gross investment undepreciated (7). This court said, of this valuation: "The final figure $460,000 was arrived at substantially on the basis of actual cost less depreciation plus 10% for going value and $10,000 for working capital. This resulted in a valuation considerably and materially less than would have been reached by a fair and just consideration of all the facts."

Thus does this court in the Bluefield opinion, as it did in the Missouri Telephone opinion, emphasize the error of the Commission in giving consideration to but one relevant matter, or one kind of evidence of value.

In both the Telephone case and the Bluefield case the facts disclose that the utilities were not receiving a fair return upon the actual investment. In the Bluefield case, the average rate of return on the total cost of the property, from 1895 to 1915 was less than 5%; from 1911 to 1915, 4.4%; without any allowance for depreciation. The net operating income in 1919 was about $24,700, deducting 2% for depreciation from the $24,700 there remained about $15,500 available for return, or 3.4% of the Commission's value of $460,000. In 1920, the net operating income was about $25,465, leaving $16,265 available for return after allowing for depreciation.

(III) In the case of *Georgia Railway and Power Company et al.* v. *Railroad Commission of Georgia et al.*, 262

U. S. 625, the company asserted a value of $9,500,000; the Commission found a value of $5,250,000. This court in the opinion in this case said: "The refusal of the Commission and the lower court to hold that for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct." The statement of the lower court that there need be no "slavish adherence to the cost of reproduction less depreciation" was also approved by this court.

In the Georgia Railway and Power case, while the return on the value asserted by the company was only 4%, the return on the actual investment was 7%, and the Commission's order was sustained.

If the return on the actual investment is an important factor in rate cases, then it is important to note here that the appellee has not, since it began operation in 1881 received an annual return of less than 6.1% of the total actual cost of all its property. In 1919 the return was 8.8% of the total cost of all the property. In 1920, 9%; in 1921, 9.6%; in 1922, 10.1%; in 1923, 10%, and the gross revenues under Order 7080 for 1924 were estimated, by witnesses of appellee and appellants, to exceed those of 1923 by $295,000 to $357,000. Under the larger of these estimates for increased income, the appellee's income available for return in 1924 would be 13.1% of the original cost of all the property, as of December 31, 1923, less depreciation reserve invested in the property (R. 364, 333).

Since this appeal was taken the case of *Ohio Utilities Company* v. *Public Utilities Commission of Ohio*, Adv. Ops. 293 Sup. Ct. Rep. Vol. 45, p. 259, has been decided. In that case the evidence of property value was confined to an estimate by the Commission's engineers of spot

reproduction cost less depreciation. The estimate was $154,655.93, but the Commission fixed the value for the rate making purpose at $145,055. The Commission rejected an item of $5,000 included in the engineer's estimate for preliminary organization expenses. This rejection was based on the theory that these expenses had not been incurred, but the court held the rejection erroneous for the reason that reproduction value is not a matter of outlay but of estimate and there was no evidence showing that such organization expenses would be less in reproduction. The Commission also reduced several items included in the engineer's estimate without justification in the evidence, there being no evidence to support such reductions. The cause was reversed for these reasons.

There is nothing in the decision or in the opinion of that case which would lend support to the view that evidence of spot reproduction cost must in all cases be given dominant consideration in a determination of fair value. In that case it was, of course, given not only dominance but controlling weight for the simple and obvious reason that there was no other evidence of value before the Commission. The only significance of that case is, that a finding of fair value must rest on the evidence heard and that evidence cannot be capriciously disregarded. That decision does not change the rule that all of the relevant facts as shown by the evidence, should be considered in a determination of fair value.

Reproduction Cost Not the Sole Measure of Value.

Not only does the analysis of the foregoing cases show that their results do not raise any implication that dominating or controlling weight must be given to evidence of reproduction spot depreciated at the time of the in-

quiry in determining fair value; but this court, in May, 1924, in *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 125 (although not a rate case), cited the first three cases analyzed above and of the method of ascertaining value said:

> "This court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of or guide to value."

The Constitution Protects the Property—Not a Particular Theory of Valuation.

The holding of the Court below that evidence of reproduction spot must be given dominance in determining fair value is tantamount to holding that a public utility has a constitutional right to have its rates based upon the estimated cost of the reproduction of its property. Such position, of course, is not tenable. As the Hon. Charles Evans Hughes, sitting as referee in the Brooklyn-Borough Gas case P. U. R., 1918, F. 335, said:

> "While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it can not be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances * * * The enforcement of the constitutional guaranty does not require the application of any artificial formula. It has constantly been pointed out that the rate base must be what is called 'the fair value of the property,' and that as to this there must be a reasonable judgment based on a proper consideration of all relevant facts."

This pronouncement of Ex-Justice Hughes is of the same tenor as the expression of this Court in the Minnesota Rate cases, 230 U. S. 352, 434:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

The Court in the Georgia Power case and the Brooks-Scanlon Corporation case, as quoted above, specifically and in no uncertain terms dispose of any theory that reproduction cost at the time of the inquiry, is the sole measure of value.

Fair Value Rule of Smyth v. *Ames Unchanged.*

This Court has not deviated in its decisions from the fair value rule laid down in *Smyth* v. *Ames,* 169 U. S. 466, 546, 547, as to what the rate base is or as to the method of measuring the rate base; nor has it narrowed the compass of evidence by eliminating a consideration of all relevant matters enumerated in *Smyth* v. *Ames,* except replacement cost.

In *Smyth* v. *Ames* was laid down the fair value rule, which defines the rate base and describes the method of measuring it. As to what the rate base is, the Court said:

> "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction, must be the fair value of the property being used by it for the convenience of the public."

As to the method of determining the rate base, the Court said:

> "And in order to ascertain that value the original cost of construction, the amount expended in

> permanent improvements, the amount and market value of its stocks and bonds, present as compared with the original cost of construction, probable earning capacity of the property under particular rates prescribed by the statute, and the sums required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

The base value, therefore, in *Smyth* v. *Ames*, to be used in measuring the reasonableness of the prescribed rates was made to depend, not upon the original cost of the property; nor its estimated replacement cost at the time of the inquiry; nor upon the amount of outstanding securities; nor upon the market value or commercial worth of the property used in the service—it was the value in the use of the property and, since the public has an interest in that use, (*Munn* v. *Illinois*, 94 U. S. 188) the court, for the common good of both the utility and the public, held that the utility was entitled to earn a fair return upon the fair value of its public service property.

Fair value for rate making purposes means today, in law, what it meant in 1898, when *Smyth* v. *Ames* was decided—it is that value, which, under all the facts and circumstances surrounding the particular case, is fair both to the utility and the public.

Appellants urge that a study of the rate cases passed upon by this Court clearly shows, that this Court does not concern itself primarily with the question, whether a particular method of valuation has been followed; but only with the question, whether upon the entire record before it, it appears that a just and fair measure for the

rates challenged has been adopted. This Court considers each case in the light of its own particular facts and adopts no yardstick for measuring fair value, except the yardstick of equity.

It is appellants' view that fair value means something more than present cost, and "is not synonymous with present replacement cost." A judgment figure establishing fair value should contemplate a degree of permanency and stability for the value fixed. Valuations are fixed not for a day, but should, when fixed, serve as a rate base for such time, at least, as average conditions obtain. It would not be practicable nor fair to utilities or the public to adopt as the sole measure of value the spot reproduction cost estimate depreciated, for values so measured would necessarily fluctuate upward and downward with every fluctuation in the labor or material market, and fairness to both the utility and the public would require a constant revision of valuations and rates in order to keep pace with market fluctuations. There would be no stability in valuations or rates under such a practice and a serious detrimental effect on service itself would follow, for it is obvious that capital would not be attracted to an investment where there would be no stability in the value of securities, it being plain that the value of securities would fluctuate with the rates and property valuations.

Spot Reproduction Estimates Were Considered in Arriving at a Fair Valuation.

The Commission did not disregard the engineers' estimates of spot reproduction costs. Quite to the contrary, these estimates were treated as relevant facts and were given liberal weight on the question of appreciation in the value of appellee's property. It is clearly demon-

strable that the Commission considered these estimates, when it fixed the fair value of this property at $15,260,400, to the extent of allowing not less than $6,054,491.61 for appreciation over and above every dollar that ever went into this property from any source whatsoever, and to the extent of allowing not less than $3,626,833.44 for appreciation over and above the fair value of this property as found by appellant Commission in March, 1921.

The total investment by appellee in its property from sale of stocks, from sale of bonds, from surplus reinvested, from depreciation reserve invested—from all sources—totaled $9,195,908.39, and this investment is $6,064,491.61 less than the finding of fair value in order 7080, namely $15,260,400.

The Commission had a right to treat its finding of the fair value of appellee's property as of March, 1921, as the best evidence of what the fair value of the property was at that time. The value at that time as fixed in Order No. 5798 was $10,814,000.00 and appellee accepted this figure as a fair value of its property as a rate base then.

The finding of $10,814,000.00 included an allowance of $600.000.00 for estimated expenditures for additions and betterments during 1921. As a matter of fact, the net additions and betterments during 1921 were $431,315.94. (Gross additions of $502,837.62 less accrued depreciation of $71,521.68—R. Fol. 382 following p. 326) or in other words, $168,684.06 less than the $600,000.00 allowed, and this amount which was never invested should be deducted from the $10,814,000.00, leaving as the base figure in this demonstration the sum of $10,645,315.94.

The valuation here in litigation thus appears as being $4,615,084.06 higher than the fair value of appellee's property in March, 1921. What are the items of value that the appellant Commission necessarily allowed and which

comprise the difference between the fair value of appellee's property in March, 1921, and that here attacked? They are these: (1) Betterments and extensions and (2) appreciation in value of the property. And in what amounts were allowances made for each of these items? The record shows the following: The gross additions and betterments to the property during the year 1922, were $300,470.21 and during the year 1923, $851,381.44, a total of $1,151,851.65. The accrued depreciation during the year 1922 was $85,757.15 and during the year 1923, $77,843.88, a total of $163,601.03, which, when subtracted from the aforementioned $1,151,851.65, leaves $988,250.62 as the net amount of additions and betterments to the property that occurred in the period that elapsed between these two findings of fair value. (Ex. 55 R. Fol. 382 following p. 326).

The difference in the two findings of fair value being $4,615,084.06, and the net amount of additions and betterments being $988,250.62, it must necessarily follow that the Commission allowed $3,626,833.44 for appreciation since March, 1921.

The appreciation since March, 1921, can be shown to be $3,121,833.44 in physical property, and $505,000.00 in going value, water rights and working capital. The finding of fair value of $15,260,400 included $14,280,400 for physical property and $980,000 for going value, water rights and working capital. The finding of fair value of $10,814,000 included $375,000.00 for going value, water rights and working capital (R. 212) plus an additional allowance of $100,000.00 for working capital (R. Fol. 382 following p. 326)—a total of $475,000.00. Since the $10,814,000.00 must be reduced to $10,645,315.94 on account of moneys which were never invested, we have the following summary showing appreciation allowed:

	Physical Property	Going Value, Water Rights, Working Capital	Total Property
Fair value, Order 7080, the figure attacked	$14,280,400.00	$980,000.00	$15,260,400.00
Fair value, 1921 order	10,170,315.94	475,000.00	10,645,315.94
Difference ...	$4,110,084.06	$505,000.00	$4,615,084.06
Net additions and betterments during period between the two orders	988,250.62	.....	988,250.62
Net appreciation allowed.	$3,121,833.44	$505,000.00	$3,626,833.44

The only evidence in the record by which such an allowance for appreciation could be sustained is the engineers' estimates for spot reproduction cost, depreciated. Thus, it appears plainly, that the Commission did not disregard the engineers' estimates of spot reproduction, but on the contrary, used this evidence to support a finding of appreciation of $6,064,491.61 over total investment, and an appreciation of $3,626,833.44 in fair value over fair value of March, 1921. Does the Constitution of the United States require that greater weight should have been given this evidence? If so, how much more? It is appellants' view that the Commission acted well within its power as a fact-finding body when it assigned the weight to these estimates as the said figures indicate. (Minnesota Rate case), and that it was entirely outside

the power of the court to set aside the finding on that ground.

Was the Spot Reproduction Cost Estimate $19,000,000 *of Carter Unimpeached?*

In appellant's view, Carter's spot reproduction cost estimate does not become the controlling proof of fair value as a matter of law, even though it be considered as the lower court did, as standing unimpeached. But Appellants believe that these estimates, including Carter's, are self-impeaching. An analysis of the bases on which they rest discloses their infirmities.

The spot price appraisals of the engineers of the Appellee and of the engineer of the Commission herein are subject to reductions, on principles hereinafter set forth in this brief. Carter's $19,500,000 spot appraisal as of January 1, 1924, (relied on by the lower court as a minimum measure of fair value) when subjected to those reductions, is less than the Commission's value in Order 7080.

The opinion of the District Court treats the spot reproduction appraisal of the Commission's engineer, Carter, as an "Unimpeached" appraisal. Carter offered no exhibit showing the details of his $19,500,000 spot reproduction cost as of January 1, 1924, but he used the same inventory as in his other appraisals and he set out in other appraisals the elements which he regarded as proper for consideration.—From those other appraisals and his oral testimony it appears that Carter's spot price appraisal contains: unwarranted structural overheads of 15% on all property including lands; an estimate of reproduced property, not proper in a rate base because originally produced from depreciation reserve money in

the amount of $644,749.22; in addition to its appraised value as land, an wholly improper construction cost of the Canal which was a pre-existing geographical feature adopted but not construed by the appellee or its predecessor, $1,049,447; a depreciation unwarrantably minimized by about $2,000,000; working cash capital of more than $100,000; theoretical land damages and charges for accumulation of canal land $280,000; non-operative property of at least $648,000.

The question as to the propriety of the use of all these elements in a reproduction appraisal in this particular case will be submitted under a discussion of all reproduction appraisals later, but at the present it is desired to point out specifically that Carter's $19,500,000 spot appraisal was impeached, if attacking the theory of the appraisal and the inclusion of large and improper elements is impeachment, or if the showing by other appraisals that Carter's was too high may be regarded as impeachment.

Order 6613.

The opinion of the lower court deals much with the value of appellee's property as found by Order 6613 in the amount of $16,455,000 (R. 219). While as stated in the opinion Order 6613 is not being attacked in this case, obviously, the lower court felt that any value fixed for the appellee's property if less than that fixed by Order 6613 would be unsupportable. Order 6613 was issued January 2, 1923, about eleven months before Order 7080 (the one here in controversy) was issued. Order 6613 was one fixing the value of appellee's property *only* for the purpose of issuing securities. As said by the Commission in that order, the purpose of the order was not to find or establish a value of used and useful prop-

erty for rate purposes but to find a value of all property owned by the utility whether used or useful, operative or non-operative, which would support securities. Order 6613 says, "This case does not involve rates, it may be said that of the total property herein found, a million dollars or more is of questionable character so far as its inclusion in a value for rate-making purposes is concerned" (R. 238, 239). Again, in the order, the Commission says (R. 232): "The propriety of including the whole value of the circle property in a value for rate-making purposes may be seriously questioned when the occasion arises because it is doubtful if all is used or useful for the convenience of the public. The propriety of including the whole value . . . in this total" (the value for securities) "can not be questioned." Order 6613 (R. 232).

If the Commission were correct in its theory that an appraisal for security purposes should include all property, whether used or useful, and that an appraisal for rate purposes should include only such property as was "used and useful" for the convenience of the public" (Indiana Acts 1913, Sec. 9, page 173, see Appendix p. 118), that would account for a possibility of a "million dollars or more" difference between the value in Order 6613 and Order 7080, which are respectively $16,455,000 and $15,260,400.

As a matter of fact, no securities appear to have been issued under Order 6613, and if that order can be said to have any relation to a rate valuation then, to the extent that it is inconsistent with Order 7080, it is repealed or modified by the latter order.

The question in the case is not whether Order 7080 is inconsistent with or overthrows a previous valuation, but whether this order, 7080, is in fact confiscatory.

Generally of the Appraisals.

The numerous reproduction cost appraisals on spot and other prices, introduced by the appellee, included many elements of alleged value which were criticized and attacked by the appellants; and these elements are presented separately herein with the reasons for the objections, by the appellants, to their inclusion in a rate base.

Whatever may be the obligation of the engineer to the technique of his science, it is the appellants' contention that if the experience and history of the company are that it did not actually incur certain costs but in fact avoided them, then such costs are not a part of the property and should not be considered in valuing it, merely because an engineer, in making an appraisal for reproduction, insists on including such theoretical costs. There is no good reason to assume in any case, that if the property were reproduced by the company or by persons of equal intelligence, the theoretical costs would not again be avoided.

Structural Overheads as Shown in Appellee's and Carter's Appraisals.

The appellee's engineers and Carter, the Commission's engineer, say that the general experience is that a 15% structural overhead is incurred in constructing a water property; 15% for that reason is added to the reproduction appraisals of those engineers. The appellants show, and it is uncontradicted, that the total structural overheads of the appellee, as shown by the books of the company, were $499,970.91, of which $274,279.83 were charged to operating expenses and not to capital; and that the total overheads from the time the appellee

began operations in 1881 until December 31, 1923, were only 5.8% of the actual plant and property investment (R. 321, 322). The actual overheads of the appellee from 1913 to 1923, inclusive, were 7% of the property and plant investment for that period (R. 322).

Every Dollar Accounted for.

Hagenah, witness for the appellee, justifies his 15% overheads on the ground that to the 7% actual overheads from 1913 to 1923 there should be added 8% for interest and taxes during construction (R. 80), because the amount of interest and taxes during construction were not shown on the books. This would raise the overheads from 7 to 15%. This theory is not tenable because the books of appellee show no charges to capital for taxes or interest and do show every cent expended from the date of its organization to December 31, 1923.

The total moneys from all sources coming into the company's treasury were:

Sale of stocks and bonds 1881-1923 (R. 320)	$5,177,408 00
Gross revenue (R. 328)	24,482,871 57
Depreciation reserve (R. 321)	644,749 22
Total	$30,305,028 79

Note: (The stocks and bonds other than above indicated were issued as dividends, consequently do not represent money received in addition to the gross revenues).

The total expenditures from 1881 to 1923 inclusive were:

Property and plant (R. 319)	$9,245,628 89
Operating expenses (R. 328)	10,050,271 92

Interest on bonds (R. 328)	6,095,367 11
Dividends (R. 328)	4,736,318 71
Premiums, adjustments, etc. (R. 329, 328, 321)	177,442 16
	$30,305,028 79

Thus the total money shown by the books of the company to have been received from *all sources* exactly equals the total amounts shown by the books to have been expended. Consequently, the theory that additional expenditures were made for interest and taxes during construction which do not appear on the books can not be supported by the record. Appellee, according to the law under which it was incorporated, was required to make an annual accounting of all receipts and disbursements (Appendix p. 117).

The overheads of the appellee have at all times been under excellent control. The plant and property is one of "piece-meal" construction as the appellee admits. The large part of the construction has been laying mains and services, etc., only a small part of which had to be constructed before service began on it. The flat rate users on the lines paid three months in advance for their services. The extensions of the mains and lines have been made as the demand for service required it, so there was no hiatus between construction and return; but on the contrary, as parts of the lines were completed, service began and was partially paid for in advance. Construction after March each year was not listed for taxation until March of next year. It was possible therefore for the appellee to get into operation its additions and betterments long before they would even be listed for taxation. Contractor's profits could be elimi-

nated because the piece-meal construction enabled the appellee to use its own employes for construction and avoid contractors' profits and other costs incident to large construction programs.

Had Hagenah, Elmes and Carter used the 5.8% overheads shown by the books instead of the 15% they would have reduced their appraisals based on the prices prevailing December 31, 1923, or January 1, 1924, by amounts ranging from $1,816,962 to $1,549,970.

Had these engineers accepted the actual overheads charged on the books to capital and excluded those charged to operating expenses, they would have shown overheads for capitalization of $245,335 instead of overheads varying from $2,979,000 to $1,690,000.

On the theory that hypothetical costs not actually incurred can not be allowed as elements of a rate base (*Galveston Elec. Co.* v. *Galveston*, 258 U. S. 388, 397, and the Des Moines Gas case, 258 U. S. 153, 172), the appellants are contending that, whatever the experience may be in other localities, or whatever the assumptions of reproduction appraisal engineers may be, structural overheads far in excess of those shown by the history of the company should not be allowed as a part of the value for rate purposes; and that when a part of the actual structural overheads have been charged to operating expenses such part should not be capitalized, since by doing so the consumers would be required to furnish the capital and pay a return on it. If these points are well taken the actual overheads charged to capital, in the total amount of $245,335, are the only overheads that should be allowed in fixing the fair value of the appellee's property. The application of such overheads to the appraisals containing 15% overheads would reduce some of those appraisals more than $2,500,000.

Depreciation.

The theory upon which depreciation was calculated by the engineers in this case made a most important variance in the appraisals. Hagenah in his spot price appraisal as of December 31, 1923, shows a depreciation (total reproduction cost new less present value) of $1,117,889. Carter shows a depreciation of $850,000. Elmes shows no depreciation but says that by the expenditure of $443,044, the plant and property can be put in 100% operating condition. W. S. Bemis, by using the straight line method, ages and lives of the property, for which the figures were furnished by the appellee's consulting engineer (Metcalf), ascertained that the property was about one-fourth depreciated. His depreciation calculated on that basis ranged from about $3,500,000 on a $14,000,000 total property value to $2,998,294 on a $12,216,508 value. Metcalf, the consulting engineer of the appellee, who had determined its development policy for years, recognized the straight line method of calculating depreciation; and the ages and lives of the various parts of the property used in the Bemis computation were the ages and lives established by Metcalf. The accuracy of the ages and lives were not questioned.

Hagenah said he did not think the straight line method was accurate, but that engineers used that method in determining the expectancy of property (R. 89). Elmes regarded all depreciation figures as theoretical. He thought the only way to determine the condition of the property was to ascertain what it would cost to put it in 100% operating condition. Hagenah thought it was proper that the annual depreciation collected by the appellee for the last ten years should exceed his total depreciation on the property, which it did. He saw no

relation between the annual depreciation and the accrued depreciation for the reason that maintenance and additions went into the lines (R. 79).

The records of the company show that in the last ten years $1,117,266.98 depreciation was charged to operating expenses and only $170,424.16 had been spent for renewals and replacements (R. 324).

It is submitted: that there is some relation between the annual depreciation and the accrued depreciation; and that, where a utility has been allowed large depreciation charges and has accepted them and used only 14% of the charges for replacements and renewals, there has been either an improper charge or a considerable depreciation.

If the depreciation charged to operating expense were excessive, it has been collected and some considerable portion of the amount so received should be treated as properly charged, and the property treated as having depreciated accordingly. Any other treatment of depreciation collected would be an abuse of the theory upon which it was charged.

Hagenah and Carter determine depreciation largely by inspection and get about 94% or 95% condition for property in use for many years. It seems illogical to treat water pipe as being in 100% condition because it does not leak today, when it is known, from the time it has been used, that next year or the next, it must be replaced. E. W. Bemis illustrated depreciation with the electric light bulb, which is in 100% operating condition prior to the instant it becomes utterly worthless. The analogy between the appellee's property and the light bulb may not be perfect but it is much more nearly perfect that Hagenah, Carter and Elmes recognize when they find the property is in 95% condition or better.

It may be that a pipe in the ground for thirty or forty years does not appear to be much used, but the processes of nature are inevitable, and the effect of thirty or forty years' exhaustion of usefulness is inevitably present, and the fact that it is there should be reflected in an appraisal.

Canal Construction.

Hagenah, Carter and Elmes arrive at a value of the canal by appraising it first as land at the present prices for adjacent land. They then theoretically construct the canal. Carter removes trees from the land before digging the canal. This construction cost varies in amounts ranging from a maximum of more than $1,200,000.

The canal was built by the State of Indiana for navigation. The old water works company acquired the canal or the use of it and the appellee bought it at judicial sale, carrying it on the books from 1881 until 1909 at $50,000 and writing it upon the books in 1909 at $1,773,874 (R. fol. 354 following p. 298).

The question raised by the appellants in connection with the canal appraisal is as to whether it should be valued as land and the cost of its construction added to that. The appellants insist that the estimated construction cost of the canal should not enter into the appraisal; first, because the vast expense of constructing it was paid by the public, the state; second, because pre-existing geographical or topographical conditions acquired by purchase and not constructed by the utility should not be reproduced; third, because the canal would not be constructed in actually building a new water plant; fourth, because the canal pre-existed the appellee and its predecessor by many years and would not be constructed if

a new plant actually were being constructed now but would be taken, if used at all, by eminent domain proceedings at the value of the land adjacent, or less, probably. So far as appears from this record the canal has no value except land value. (Minnesota Rate cases.)

The reproduction of a canal which did not have to be built by the company is analogous to the theoretical reproduction charge for the laying of pavements which did not exist at the time the water lines were laid and which charge is not allowed in a valuation. *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 152, 171-172.

The only reason appellee's engineer, Hagenah, could give for reproducing the canal was that he "found it" in the company's property. He admitted he would not have a company build the canal if this canal pre-existed the company, but would have the company condemn the canal and pay the purchase price determined by the court. Courts have held that even in condemnation proceedings a canal should not be given a reproduction value unless it is reasonable to reproduce it. *U. S.* v. *Boston Canal,* 271 Fed. 877, 889; *North Fork Ditch Co.,* P. U. R. 1916D 447.

The lower half of the canal property is used only for hydraulic or power purposes, running three turbines. It was not contended that the part of the canal used for such purposes would be rebuilt for that purpose in a new development nor in fact was it contended by any witness that the canal's actual value would warrant any portion of it being duplicated in a new plant.

If the canal is valued as land at the enhanced prices of the surrounding land it will be given a fair value, consideration being given to the facts: that it was built by the state for navigation purposes; that it was a pre-

existing geographical condition which would not now be built for its present purposes and which if taken now by condemnation would not be given an appreciated value, in the judicially determined purchase price, because it might have some degree of special usefulness in the public service for which it was being condemned.

Water Rights.

The appellee's engineers fix a value for water rights in the amount of $500,000. The appellee admitted before the Commission that no water rights had ever been purchased aside from land purchases. Elmes (appellee's witness) capitalized the sale of raw water from the canal at $250,000, after appraising the canal as land and then adding to that the construction cost of the canal.

He and Carter appraised a hypothetical overflow land damage at the two dams at the present land prices. It appeared from the books that nothing had ever been paid in any way for water rights except by the purchase of land. All purchased land was included in all appraisals at the enhanced present prices. No damage for overflow was ever paid, if any land other than the appellee's was ever overflowed. The appellee does bring river water into its canal but there is no showing that any riparian owners are adversely affected or in any way affected thereby, or that there was ever any damage by such diversion.

The Commission in Order 7080 did allow something for water rights. Anything it allowed was, however, a gratuity to the appellee, since no water rights were purchased aside from the purchase of the land of which they were a part. Hypothetical damage caused by an assumed overflow has no place in a valuation. Reproduction costs

which were not costs of the property are not proper matter for consideration in a valuation. *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 152, 171, 172; *Minnesota Rate case*, 230 U. S. 352.

Going Value.

Elmes and Hagenah allow $2,000,000 for going value in their appraisals. Hagenah partially defines going value as follows: "One of the main factors in going value is that the people using the service give what you call going value." It seems that Hagenah does not distinguish between going value and good will. His estimate for going value he concedes to be entirely a "judgment" figure. Elmes measures going value by an artificial rule or rather an average of two or three artificial rules, using the appellee's gross income for a period, the net income for a period and the total property value and dividing. No relation is shown between the gross income, the net income and the property value, which tends to prove that Elmes' calculation has no actual bearing on the going value, whatever it may be. In Elmes' calculation the larger the income the larger the going value, notwithstanding the fact that the property in the first year of its existence may have established its operations on a going basis. Going value does not include good will but covers merely the cost of "establishing a system as a physically going concern." *Galveston Elec. Co.* v. *City of Galveston*, 258 U. S. 388, 394. It is "the investment necessary to organizing and establishing the business" or "what may be called the inception cost." *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153. It is never measured by an artificial rule, but if it exists, it exists in a concrete form as a cost of getting a fully equipped but

non-operating plant into operation. If the cost of starting the operation is charged to operating expenses and returned in the revenues, or if it appears that the cost has been taken care of in overhead allowance, it will not be given further consideration in arriving at a value for rate purposes. *Des Moines Gas Co.* v. *Des Moines, supra,* 165, 166.

In the instant case, the appellee charged $30,180.96 to organization expenses; other than that, no expenditure of any kind was shown on the books, which carried a suggestion of going value, or of development costs. There was no charge to capital for development costs. No evidence was produced to show what had been spent in getting the business in operation. In 1909 the company made a write-up on its books of $1,004,000 for going value. Unless the arbitrary write-up or the "judgment" figure of Hagenah or the artificial rule used by Elmes constitutes evidence of going value (which under the authority of *Galveston Elec. Co.* v. *Galveston,* 258, U. S. 388, 394, and *Des Moines Gas Co.,* 238 U. S. 153, 166, they do not) there is no basis for holding that Order 7080 has not given more consideration to going value than the evidence warranted. The enormous going values fixed by appellee's engineers indicate that the cost of getting started never ends, that the more successful and prosperous the utility becomes the larger its cost of getting started becomes.

When the appellee connected its supply with the consumers' demand, the going value was then established, the development cost was fully accrued and finally determined; and such value and costs should not be extended further than the actual economic requirements of the situation.

Since this company started, the demand for service has

kept it in constant process of expansion. It has not been required to pay to get business, but on the contrary, its business has grown as rapidly as it could get ready to take care of it; so its history is one peculiarly free from development costs and similar expenditures, and its books are therefore likewise peculiarly free from any such recorded costs.

The write-up on the books of the company of $1,004,000 for going value shows clearly that the company was not relying on any actual expenditures in bringing the business to successful operation but was capitalizing going value on the theory that since the business of the company was successfully operating and had been from its incipiency, the business was more valuable because successful. Such a theory would make good will, the ever present and naturally increasing demand for service, and the monopoly or control of the supply, elements of going value or development costs; but these elements are not recognized as elements which a public utility can capitalize. In a sale the existence of them might increase the value, but they are in fact public gratuities resulting not from expenditures and effort but from the franchise or control of supply under the approval and protection of the state and under a public demand uninduced by any expenditure of the appellee. *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 52; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 164, 165.

Going Value Is Not Growing Value.

If there has been any evidence in this case, which there was not, to show any cost of developing the operating system of the appellee into a financially successful concern, such evidence would have no weight in determining the question as to whether the rate here involved was

confiscatory. In the *Galveston Electric case*, 258 U. S. 388, 392-4, the court says: "The going concern value for which the master makes allowance is the cost of developing the operating railway system into a financially successful concern"; following this, on pages 391-7 of the opinion, the court said: "Going concern value and development cost, in the sense in which the master used these terms, are not to be included in the base value for the purpose of determining whether a rate is confiscatory." The amounts estimated for going value by the appellee's engineers clearly show that they are not estimating the "cost of getting the plant into operation" but are estimating the "cost of developing the operating system" into its present condition, as a financially successful concern.

Pavements.

Hagenah in his reproduction appraisal adds $240,000 to construction cost, because of the theoretical added expenditure for laying mains in congested districts. Elmes makes a similar charge $178,993 and the books of the company carry an item of $199,667.91 (R. 326) for paving over lines which was never done. Since these costs were not actually incurred by the appellee, and are purely theoretical, they should not be considered in fixing the value in a rate case or determining whether a rate fixed is confiscatory. *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 171, 172; *Winona* v. *Minn. Light & Power Co.*, 276 Fed. 996, 1005.

Contractor's Profit.

The engineers of the appellee allowed from 10% to 15% for contractor's profit in arriving at specific construction costs, and then to such specific construction

costs added 15% overhead allowances, Exhibit 1 (R. 169, 181). The appellee's property was built by "piecemeal" construction and by the use of regular employes under regularly employed supervision. Since there was no expenditure made by the appellee for contractor's profits or for construction charges other than those shown on the books to have been paid for labor, supervision, during construction and other elements of structural overhead, there is nothing to warrant the inclusion of contractor's profit in the rate base. Perhaps engineers always assumed that a plant wholly constructed at one undertaking would require the intervention of contractors, and would involve their profits. There being no such history in this case, there is no warrant for allowing such cost. Theoretical costs, never incurred, are eliminated from such consideration by Des Moines Gas case, 238 U. S. 153, 172 (theoretical pavings), and the Galveston case, 238 U. S. 388, 397 (hypothetical brokerage fees).

Non-Operative Property.

There are some $119,000 of non-operative property set out in Hagenah's appraisal. Carter put the non-operative property at $648,000. Why non-operative property which has never been useful and never will be; why non-operative property once useful but not now used; or why property once useful in part but now of a value far in excess of any which its use warrants; should be included in a rate base does not appear. The appellee recognized the fact, before Indiana had a Public Service Commission, that its "Circle" property and some of its land was too valuable to be used in the business and eliminated it from a mortgage of the property on the ground that "a commission would not give us credit for

the same in our capital account as property useful and necessary for conducting our business." The entry on the company's record further shows that: "Owing to its location and value it will be necessary to handle the former property to increase its earning ability at some period early in the life of the mortgage." This entry was made in 1910, three years before the Public Service Commission of Indiana came into existence (R. 291).

It is the appellants' contention that the inclusion of non-operative property and excessively valuable property should not be included in the rate base and should be excluded from the appraisals.

Depreciation Reserve.

The Public Service Commission Act of Indiana, Section 25 (Appendix p. 119), provides that depreciation fund moneys "may be expended for new construction, extensions or additions to the property . . . But in no event shall the moneys expended from the fund for new constructions, extensions or additions to the property be credited to or considered a part of the capital account of any public utility." This act precludes the capitalization of $644,749 depreciation reserve money invested in property and plant and carried in all the appraisals.

The $19,000,000 Figure Examined.

The court below adopted as its guide to fair value the evidence of reproduction spot depreciated as of the date of the inquiry; and held that $19,000,000 reflects unimpeached the minimum reproduction value. The court said that the appellant Commission, "through its own witness (Carter), through its engineers, furnishes, as a minimum figure to be considered, exhibiting spot repro-

duction value at the time of the inquiry approximately $19,000,000" (R. 63).

Examining this figure of $19,000,000 in the light of the facts in this record and principles of law applicable thereto and heretofore discussed, it is possible to determine whether or not it was unimpeached, by the elements it contained, as a controlling measure of fair value.

Carter's spot price figure of $19,500,000 as of January 1, 1924, was made up of a physical value on the April 1, 1922, inventory (prices as of January 1, 1924) of $18,487,817 (R. 132). This amount included materials and supplies without overheads in Exhibit 33 (R. 262) at $102,997 (and this on a 1911-1920 basis), and 15% structural overheads on all property, including land other than materials and supplies, plus betterments without overheads since 1922 in the sum of $1,000,000 (R. 125-132). This spot price figure may be tabulated thus:

Value as of January 1, 1924	$18,487,817
Materials and supplies (Exhibit 33)	102,997
Base value, including 15% overhead	18,384,820
15% overhead	2,398,020
	15,986,800
Additions and betterments April 1, 1922, to January 1, 1924	1,000,000
Base value less overheads January 1, 1924	$16,986,800

As against the above allowance of 15% for structural overheads, the books of appellee (R. 321-322) show the total expenditures from 1881 to December 31, 1923,

to be only $499,970.91, which is but 5.8% on the property and plant investment. Carter's theoretical allowance for structural overheads exceeds the actual overheads by $1,898,049.09.

This $19,500,000 spot price figure contains $644,749.22 worth of property and plant purchased with depreciation reserve money (R. 317) and $583,509.27 worth of plant and property purchased with money charged to operating expense (R. 317).

This $19,500,000 spot price figure contains $1,049,447 for a theoretical labor cost in making, or reproducing upon many assumptions, the canal, and this in addition to $1,690,070, the market value of the canal land (R. 131).

This $19,500,000 spot price figure was arrived at by giving to the property a 94% condition. This means that Carter regarded only 6% of the property life exhausted (R. 130). Applying to the base value above, $16,986,800, the 6% for exhaustion of service life or accrued depreciation, we have but $939,208 as the total accrued depreciation over the entire life of this property. But it is interesting to note (R. 324) that the appellee from April 1, 1909, to December 31, 1923, a period of 14 years, charged to operating expenses for depreciation $1,117,26[illegible]08. Witness Bemis (R. 338), using the straight line method and the ages and lives of property previously used by appellee's witness, Metcalf (R. 157), on 1911-1920 prices with adjustments, shows accrued depreciation $2,996,293.87. Carter's per cent condition was determined from a "combination 4% sinking fund, life table and inspection method."

This $19,500,000 spot price figure includes $150,000 for an assumed cost of the accumulation of the right of way of canal and two items aggregating $130,000 for

assumed expenditures for land damages, $280,000 in all (R. 138). As to these items, appellants quote this court in the Minnesota Rate case, 230 U. S. 352.

> "The allowance made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this, we also think it was error to add to the amount taken as the present value of the land the further sums calculated on that value, which was embraced in the items of engineering, superintendence, legal expense, contingencies and interest during construction."

This $19,500,000 spot price of Carter's includes $648,921 of non-operative property on the basis of prices [illegible]20. On prices as of January 1, 1924, this would be higher, but the evidence is not clear as to how much higher it would be.

Appellants urge that the above facts disclosed by the record in this case show that the fair value of appellee's property is not $19,000,000; and that the final figure in the following recapitulation more nearly approaches a fair or reasonable value.

Spot price value January 1, 1924 (Carter's)		$19,500,000
Deduct: Excess of allowed overheads over actual as shown by books	$1,898,049	
Depreciation reserve invested in property	644,749	
Property paid for through operating expenses	583,509	
Canal, exclusive of land	1,049,447	
For too small accrued depreciation allowance	2,000,000	

Accumulation of canal right-of-way and land damages	280,000	
Non-operative property	648,921	
Total		7,104,673
Leaves (adjusted)		$12,392,325

Note: No consideration is given in the deductions to the difference between the bulk purchase prices obtainable under contract and market quotations; nor to the differences that would result from increasing the property purchased with depreciation reserve $644,749, or the property paid for through operating expenses $583,509, to his appraisal figure spot, such differences would approximate $1,000,000.

To this adjusted figure should be added allowances for going value, water rights and working cash capital if the facts in the record warranted so doing. But appellant City urges that under the facts in this record any allowance for going value and water rights is purely theoretical. All development costs have been charged to operating expenses (R. 352 and 84), and there is no expenditure for water rights; and as to working cash capital appellee's witness, Hagenah, testified that "it (appellee) had on hand at all times nearly twice as much capital as was necessary to take care of operating expenses" (R. 84), due to 50% of the customers paying for their services three months in advance.

Order 6613 Analyzed.

Order 6613 was based upon Carter's Exhibit 33 for physical property using the average ten-year figure for labor and material 1912 to 1921, instead of 1911 to 1920

average. This gave a physical value of $14,689,078 to April 1, 1922. To this was added capital additions at actual cost from April 1, 1922, to October 31, 1922, of $215,000, making the total physical property October 31, 1922, $14,900,000. To which was added $1,416,000 for going value and water rights and $135,000 for working cash capital, making a total value of all property, both operative and non-operative, of $16,455,000, for security issuance purposes. Of this order the Commission issuing it said (R. 238-239): "This case does not involve rates . . . it may be said that of the total property herein found, a million dollars or more is of questionable character so far as its inclusion in a value for rate making purposes is concerned." Appellant City suggests, Order 6613 being based upon Carter's Exhibit 33, contains the same elements to discredit it which were pointed out above as discrediting Carter's spot price figure of $19,500,000.

Hagenah's Spot Appraisal.

Likewise, Hagenah's reproduction spot appraisal as of December 31, 1923, (present value) in the sum of $25,404,026 (R. folio 218 between R. 180 and 181) contains elements which discredit it as the fair measure of the fair value of appellee's used and useful property. This appraisal contains: an arbitrary allowance (15%) for structural overheads amounting to $2,962,468 as against a total actual expenditure as shown by the books of $499,970.91; depreciation reserve of $644,749, invested in property; property paid for in operating expense $583,509; theoretical costs of reproducing the canal, $1,072,098 (R. 172), plus 15% contractor's profit (R. 181), making a total of $1,232,913; accrued depreciation over the entire life of property of only $1,117,589 (R. fol. 218) as

against $1,117,266.98 charged by appellee to operating expense from April 1, 1909, to December 31, 1923, for depreciation (R. 324) and as against the Bemis calculation of $2,996,293.97 for depreciation (R. 338); non-operative property of $111,242 (R. 171); $175,000 added cost for placing mains in congested areas in the city and $240,000 because of downtown work (R. 83); the pipe in 96% condition (R. 78); hydrants in 95% (R. 79); services 96% condition (R. 80). This appraisal adds to the above physical property figure for working cash capital $235,000, water rights $500,000 and going value $2,000,000. The facts heretofore stated and discussed and the method of calculating these items discredit the allowance for them.

To Recapitulate.

Hagenah's Spot Reproduction (present value)		$25,404,026.00
Deduct: Excess of allowed overheads over actual	$2,462,497	
Property purchased with depreciation reserve money ($644,749) appreciated in appraisal over 100%	1,289,498	
Property paid for through operating expenses $583,509 appreciated over 100%	1,167,018	
Reproduction estimate of Canal construction with 15% contractor's profit (no deduction for market value of land)	1,232,913	
For additional accrued depreciation allowance	1,878,705	

Non-operative property over his allowance	500,000	
Theoretical allowance for extra cost of laying mains	415,000	
Going value	2,000,000	
Water Rights	500,000	
Working cash capital	235,000	
Cast iron pipe adjustment by Bemis Adjustment of $523,252 for cast iron pipe because of difference between market quotations and contract price, the difference being appreciated by Hagenah 100%	1,046,504	
	12,727,135	
Leaves		12,676,891.00

Hagenah's Lack of Faith in His Appraisal Figure.

Hagenah does not regard his maximum appraisal figure of $25,000,000, the sole measure of fair value; for in his oral testimony (R. 86-88), he fixes fair value at $6,000,000 less or $19,000,000. Of this figure $17,500,000 represents physical value and $1,500,000 represents going value, water rights, and working capital.

The Snow Pump.

While Hagenah lacks faith in his maximum spot appraisal figure, as a fair measure of fair value, to the extent of $6,000,000, the appellant City of Indianapolis lacks faith in his maximum figure by more than twice $6,000,000. In his oral testimony (R. 83), Hagenah finds a spot reproduction cost of the Snow pump at $265,200 and its condition 75%. In Exhibit 44, (R. 284),

it is shown that this pump was purchased from the Snow Steam Pump Works on February 14, 1895 for $70,000. Hagenah's arbitrary allowance of 15% structural overhead in his reproduction cost of this item is equivalent to approximately 50% of its original cost. Appellee has had this pump for the past 30 years; it is now in 75% condition; and is today worth, as an item in making up fair value nearly four times its original cost!

Bridges Never Built.

The extent to which engineers will go to enhance value, or rather to inflate value, is vividly illustrated in a reproduction cost estimate of appellee's property in 1917 in Order 1400, (R. 209). In that case (1400) Metcalf, who is the author of many "forecasts" and "calculations" in the instant case (Exhibits 18 to 31 inclusive), presented as "debatable items:"

"3% overhead and 7% interest on land"	$ 284,000
"Pavements not cut"	1,056,000
"Value of exemption from necessity of building bridges"	50,000

To borrow from the Court's opinion (R. 57)—little wonder that the City should manifest much skepticism "respecting the tenability of appellee's insistence that the Court or any investigating or appraising tribunal is bound to give controlling consideration to evidence of that character" (reproduction cost spot). The appellant City's faith in the dependability of engineers' estimates, as the controlling measure of fair value, is further shaken by the large variations in Hagenah's and Elmes' estimates on items about which there should be no dis-

putes. The record (R. 100-108) shows some seventeen items illustrating these variances.

The Bemis Estimate.

There is much support for the Bemis reproduction estimate of $10,501,929.57 (R. 338) aside from that which appears from an analysis of its elimination of improper appraisal elements contained in the appraisals of the appellee's engineers and of Carter. That support is found in the fact that over one-third of the actual investment in this plant was made from 1917-1923 (R. 318) during the high price period Ex. 61, (following R. 342). The actual investment cost of $9,195,908 (including depreciation reserve money invested and capitalized operating charges) or $7,967,649.90 (excluding the above parenthetical items), contains $2,503,861.47 invested in additions and betterments from 1917 to 1923 inclusive. After deducting these, 1917-1923 additions and betterments from the Bemis appraisal of $10,501,929.57 nearly $8,000,000 remains as the reproduction cost of property acquired prior to 1917, (which property cost only $6,692,046 and some of which is very old). If that property acquired before 1917 were regarded as only 20% depreciated, the $8,000,000 reproduction value given it by Bemis would be a 50% appreciation on its actual cost so depreciated.

The Rejected Evidence.

The lower half of the Canal is used only for power purposes, turning three turbines. The appellant City, offered to show, through its witness Bemis, that this portion of the Canal (valued in Carter's appraisal on 1911-1920 prices, at $1,396,170.54 depreciation deducted) was excessively valuable for the purposes for which it was

used, and that by a substitution of a pumping system, a saving could be effected which when capitalized would amount to $1,073,539.63 on the undepreciated value of the Canal; (R. 335, 336, 338). The Court rejected this evidence (R. 159-160) on the theory that it had no bearing on present value. (R. 159.)

The evidence was material and had a direct bearing on the question of confiscation. It might be that a Commission would not order a substitution of a steam pumping equipment for the lower part of the canal, but that would not prevent it giving to the lower end of the canal a value which was in keeping with the service it was rendering, or treating its value as not wholly used and useful or as too excessive for a full return. If the Commission could properly give such consideration to the evidence offered, the court should have received it in passing on the question as to whether the Commission's determination was unfair and resulted in confiscation. Especially was this true when the reproduction appraisals were reproducing the entire canal. It has been held that a rate is not confiscatory which fails to give return on property, not useful, but which may be in the future, or because it affords a partial return on property only partially useful. *Spring Valley Water Works* v. *San Francisco*, 192 Fed. 137, 154-5-6; *San Diego L. & T. Co.* v. *National City*, 174 U. S. 735, 737; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 120 N. W. 966, 977 affirmed 223 U. S. 865.

In the Southwestern Bell Telephone case, 262 U. S. 276, 312, there is a suggestion as to a partial return because of the possibility of an economic substitution. The principal of the foregoing cases applied speak for an acceptance of evidence of substitution such as the Appellant City offered.

Appellee's Exhibits Purporting to Show Past and Prospective Returns.

The evidence submitted by the appellants showing the past returns of the appellee on its investment and on the value fixed by the Commission during the time it has been regulating the appellee's rates . . . was not contradicted. The appellee, however, through its witness, Metcalf, introduced two exhibits which were prepared to show a deficiency in return. The first exhibit, No. 27 (R. fol. 305, following p. 256) *forecasts* the gross revenue and calculates the resulting return on what is called in the exhibit, the "I. P. S. Com. Rate Base". However, the witness on cross-examination explained that the "I. P. S. Com. Rate Base" was not a rate base fixed by the Indiana Commission, but was a base fixed by the witness by certain calculations of his own. It is interesting to note from the exhibit however, how the per cent of return on the hypothetical rate base creeps up from 5.1% in 1917 to 6.3% in 1926, (R. 256).

Metcalf's exhibit No. 28, (R. fol. 306 following p. 256) is also prepared to show a deficiency of return. There the "Rate Bases" upon which the calculations are based are not the Commission's rate bases, but are Metcalf's assumed bases. The rate bases he uses after 1917 vary from the Commission's by from One Million to about Four Million dollars and the rate he assumes to be a fair return, 8%, is not the rate of the Commission. This exhibit is interesting as was exhibit 27, from the fact that even with all the unfavorable assumptions, the percent of return creeps up from 5.1% to 6.1%. It appears that figures may be assumed which will show a deficiency, but no matter how high the assumed rate base

or the assumed fair return, the increase in percent of return is inevitable.

Hagenah in his Exhibit 4 (R. Fol. 220, following 182), presents computations to show a deficiency. He starts with the investment of the old Water Works Company in 1871 and allows 15% for overheads, and the present appreciation of land which is pro-rated back over the entire period, thus obtaining a deficiency of return. With these two elements eliminated, even on an assumed fair rate of return of 7½% for the entire period, the deficiency with proper depreciation adjustment would entirely disappear, a fact admitted by Hagenah (R. 125).

Metcalf, appellee's witness, estimated the return under the rates in Order 7080 for the year 1924, taking into consideration various increases in operating expenses, as well as the increase in revenues, to be $958,000.00; and that such return was the quivalent of 5.97% on the value as found by appellant Commission in Order No. 7080, namely, $15,260,400, as of May 31, 1923, augmented by additions and betterments to January 1, 1924 (R. 255). But in arriving at this return of $958,000.00, Metcalf assumed a tax base on the Commission's valuation brought down to December 31, 1923, of $15,734,000 (R. 139), although he admitted (R. 138), that the company had submitted a valuation to the State Tax Board of $12,930,000.00 and also admitted (R. 139), that he knew that the Tax Board had fixed a valuation in 1923 at some $3,000,000.00 less than the valuation ($16,455,000) fixed by the Commission in Order 6613. The use by Metcalf of this assumed tax base, involves the inclusion in operating expenses of excessive taxes over the actual taxes for 1924, the effect of which is to reduce the net income available for return for 1924 accordingly. Metcalf also includes in operating

expenses $25,000 for amortization of the costs of rate case litigation (R. 140). He also includes in his expenses an amount of $17,000 representing amortization of tax deficiencies of prior years (R. 141).

It is to be further noted that Metcalf, in his operating expense "set-up" for the year 1924, increased the depreciation allowance from $89,610.00 in 1923, to $135,000.00 in 1924, an increase of $45,390.00 (R. 254). Perk, witness for appellants, calculating depreciation on the basis of 1.25% of the actual cost of the depreciable property, as was ordered by the Commission in Order 7080 (R. 152), finds the depreciation for 1924 to be $107,619.41, an amount which is $27,380.59 less than Metcalf's assumed allowance for depreciation. If this last amount be deducted from Metcalf's depreciation allowance, without any consideration of the elimination of the three items heretofore discussed, from operating expenses, Metcalf's calculated net income available for return becomes $958,000 plus $27,380.59 or $975,380.59.

This return is the equivalent of 6.09% on the Commission's value in Order 7080, augmented by additions and betterments to January 1, 1924, as shown by his Exhibit 26 (R. 254). Metcalf (R. 246), speaking of the saving in operating expenses due to meterization said, "There will also be important saving in operating expenses, etc." The amount he did not calculate.

Jirgal, appellee's witness, showed an income available for return for the year 1923 of $902,367.91 (R. 243). He estimates the increase in revenues resulting from Order 7080 in the year 1924 over 1923 in the amount of $295,000.00 (R. 112). Adding this latter figure to the $902,367.91 would give the sum of $1,197,367.91, as the income available for return. This return is the equiva-

lent of 7.51% on the Commission's value in Order 7080, augmented by additions and betterments to January 1, 1924. Jirgal did not submit any estimate relative to increased expenses likely to be sustained in 1924 over 1923.

Perk, appellant's witness, taking into consideration increased revenues to be derived under Order 7080, and also increased expenses to be incurred in 1924 over 1923 calculated the income available for return for the year 1924 to be $1,121,550.19 (R. 333). This return is the equivalent of 7% on the Commission's value in Order 7080, augmented by additions and betterments to January 1, 1924.

Perk also shows that this income available for return for 1924 in the amount of $1,121,550.19, is the equivalent of 13.1% on the original cost of the property and plant less Depreciation Reserve invested in same as of December 31, 1923 (R. 333).

Thus the record shows that the Commission properly considered all relevant facts showing values; and that the valuation fixed is within the range of fairness, as defined by law. The rate schedule based on said valuation is sufficient to provide a fair return on said valuation and hence, it was reversible error for the court to enjoin the enforcement thereof.

Appellee Contented With Commission Rate Orders.

This case bears unusual evidence of a practical appraisal of fair value put on the appellee's property by its officers and owners. The Company from 1917 to 1923 inclusive, accepted and operated under the rate orders issued by the Commission. These orders began with a $9,500,000 value in 1917, and ended with $10,814,000 value in 1921. In fact, until 1923 when Order 6613 was pro-

cured by the appellee, valuing both its useful and non-useful property for the purpose of limiting securities, the appellee was contented with the Commission's orders. After the Commission in 1923 fixed a value of $16,455,000 for security purposes, the appellee made its application for increase of rate base and rates. When Order 7080 was issued, in response to that application, with the approval of three of the Commissioners and with a strongly expressed dissent by two of the Commissioners, the Appellee sought by communications (post card), addressed to 40,000 or 45,000 of its customers, to justify and explain the order (Post Card R. 345). Note: (The Commission's order required the appellee to put its flat rate consumers on meters more rapidly "to the end that as full a metered basis as practical be obtained as soon as possible," (R. 33). The post card which was sent to the 40,000 or 45,000 flat rate users clearly indicated that the Water Company was not going to put the flat rate users on meter. The only fair deduction being that the appellee did not need to take advantage of the meterization and was not going to do so. It was admitted by the appellee's auditor and engineer in testifying in the lower court that the appellee was going to take advantage of the meterization provision of the order, but the post card clearly indicated the contrary and the appellee stood in the position of justifying the order to the public on the ground that the appellee would not meterize flat rate users or 40,000 or 45,000 of them, at least (R. 166, 144).

In addition to the acceptance of previous orders and the public approval of Order 7080, the appellee through its consulting engineer and its expert witnesses, admitted that the appellee was and had been one of the successfully, and profitably operated companies of the United

States, and was in excellent condition with excellent standards of service and good credit. (R. 77, 143, 144).

It is difficult to see how the prosperity and excellent condition and credit of the appellee can be conceded without conceding that under valuations of $9,500,000 to about $10,000,000 the company has been receiving returns which made for prosperity and credit; and it is likewise somewhat difficult to understand why previous valuations, five million dollars to six million dollars lower than that fixed in Order 7080, were acceptable to the appellee, if the higher value in Order 7080 were confiscatory.

It is submitted that these circumstances and facts speak far more accurately as to what the appellee's value is, and is recognized to be by its officers and owners, than do the appraisals of its experts.

Facts Pointing to Sound Value.

The facts pointing directly to sound value show: That appellee's total Investment in property and plant as of January 1, 1924, is $9,195,008.39, of which $583,509.27 was paid through operating expenses and $644,749.22 represents depreciation reserve money invested in property and plant; that the Source of the investment is: (a) from sale of stocks and bonds, $5,177,408; (b) depreciation reserve money $644,749.22 and (c) surplus $3,423,471.67; that the total Book value of appellee's property is $13,222,258.82, which includes net "write ups" of property and plant of $4,609,888.71, among which is $1,004,000 for going value; that appellee's Capitalization is $13,321,000, which includes a stock dividend of $4,500,000 and bond dividends aggregating $3,000,000, all issued to common stockholders; that the verified Tax value of appellee's property, submitted by it to the State Tax Board of In-

diana in 1923, was $10,853,300, and in 1924, $12,937,100. The lower court's fair value is more than 230% of appellee's total gross investment, exclusive of depreciation reserve invested in property and plant! (R. 317.)

Appellee Given Benefit of Increases in Value.

The facts in the record show: That the value found in Order 7080 for the physical property alone of $14,280,400 exceeds appellee's total property and plant investment of $9,195,908.39 by $5,084,491.61; it exceeds the money which went into the plant and property from the "outside," that is from sale of stock and bonds, by $9,102,922. Can it be said under these facts that the Commission did not give due consideration to the element of appreciation in the property or did not give due consideration to present as compared with the original cost? Appellants urge that appellant Commission complied most generously with the rule—"the utility is entitled to the benefit of increases in the value of its property" when it allowed for appreciation in appellee's physical property alone better than $5,000,000, and made it a gratuitous allowance of nearly a million dollars for going value, water rights and working capital in addition to that.

Appellee's Prosperity under Regulation.

Furthermore, the facts in this case disclose that appellee has been fairly treated by appellant Commission ever since it applied to the Commission in 1917 for a valuation. Three times since rate Order 1400 was authorized in 1917, and prior to Order 7080, appellee applied to the Commission for increase of rates and each time received them; and each time accepted both valuation and rates.

Upon the fair values found by the Commission in these rate orders (R. 328), appellee had available for return the following:

In the year 1917	5.88%
In the year 1918	5.64%
In the year 1919	6.51%
In the year 1920	6.82%
In the year 1921	7.45%
In the year 1922	7.95%
In the year 1923	8.27%

Upon the gross property and plant investment, appellee during this period had (R. fol. 384 following p. 328) the following per cent of return:

In the year 1917	8.1%
In the year 1918	7.8%
In the year 1919	8.8%
In the year 1920	9.0%
In the year 1921	9.6%
In the year 1922	10.1%
In the year 1923	10.0%
And an average per annum for the 42 2/3 years—the entire life of appellee	8.6%

Under Order 7080 appellee's increase of revenues in 1924 over 1923 was estimated by appellee's witness Jirgal to be $295,000 and by witness Perk to be $357,000; and it should be borne in mind, that in 1923, under a rate order affording lesser rates than those contained in Order 7080, appellee earned all of its operating expenses, taxes, depreciation allowance, fixed interest and dividend charges, paid 8% on its common stock and accumulated during the year a surplus of $73,076.57 (R. 332).

The income according to witness Perk's estimate under Order 7080 would pay 13.1% on the original cost of the

property less the depreciation reserve money invested in it; 7% on $15,940,903.81; 6% on $18,692,503; and 9% on $12,000,000. Can it be said, under such evidence, "that it was impossible for a fair minded board to come to the result which was reached" in the instant case?

Can it be said of Order 7080, "the evidence compelled a conviction that the rates would prove inadequate?"

Where is there Confiscation?

Finally,—with the record showing: that appellee, since it came under regulation in 1917, with rate bases accepted by it from $4,500,000 to $6,000,000 less than that established in Order 7080, and under schedules of rates also accepted by it, materially less than those prescribed in Order 7080, has become "one of the successfully and profitably operated companies in the United States"; that during this period it has paid large dividends on its common stock and accumulated surpluses in addition thereto (for the year 1923 alone its surplus was $73,076.57, R. 332); that prior to the time of regulation (1917) and from the date of its organization in 1881 it has never earned less than 6.1% and as high as 10.4% annually on its total investment (Ex. 56, R. 328); that Order 7080 fixed the fair value at $15,260,400, which is $6,064,491.61 more than every dollar invested in the property from every source and $9,102,922 more than its outside investment; that Order 7080 authorized increased rates to yield a 7% return on the fair value found in such order;—under such facts, appellants ask: When did confiscation begin and where is there confiscation under Order 7080?

Conclusion.

If under all the facts disclosed by this record, said Order 7080 is confiscatory, then appellants urge: that

Regulation is of no moment; *Munn* v. *Illinois* is meaningless; *Smyth* v. *Ames*, the Minnesota Rate cases and all other rate order decisions of this court should be greatly modified.

We submit that appellee has failed to discharge the burden cast upon it, of proving that the order complained of fixes a rate base too low and prescribes rates which are confiscatory of appellee's property. And we say of the decision of the court below, as did this court say of the lower court's decision in the Knoxville water case, 212 U. S. 1:

> "The valuation of the property was an estimate and is greatly disputed, . . . and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties."

We respectfully urge that the decree herein be reversed and the cause remanded to the court below, with directions to dismiss appellee's bill.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF INDIANA,
BY ARTHUR L. GILLIOM,
Attorney General of Indiana,
EDWARD M. WHITE,
Assistant Attorney General of Indiana,
Its Solicitors.

CITY OF INDIANAPOLIS,
BY JAMES M. OGDEN,
Corporation Counsel,
CLAIR McTURNAN,
TAYLOR E. GRONINGER,
Its Solicitors.

APPENDIX.

Judgment—October 3, 1924 (Caption Omitted).

Come again the parties, complainant, defendants, and the intervening defendant, all by their counsel of record; and the court having heretofore heard the evidence, and argument of counsel, oral and written, having been had, and the court at the conclusion of the argument having taken the cause under advisement, now on this 3d day of October, 1924, upon mature deliberation, pronounces, orally, an opinion sustaining, as proved, the material averments of complainant's bill of complaint, and holding that the valuation of complainant's property, used and useful in its public service water business, of $15,260,400, as made by the defendant Commission in its order of November 28, 1923, in the Commission's Docket Number 7080, was and is lower than the fair value of such property (on November 28, 1923, and at the time the evidence herein speaks, viz.: January 1, 1924) by more than $3,500,00, and that the fair value of complainant's said property at said time was and is not less than $19,000,000, and that the water rates imposed in that order, and copied as a part of that order in the bill, are too low and are confiscatory of complainant's said property.

It is thereupon ordered, adjudged and decreed by the court that the defendants, Public Service Commission of Indiana, and each of its members, as prayed in the bill and the intervening defendant, (fols. 96 and 97) be and they hereby are perpetually enjoined from taking any step to enforce the said order of the defendant Commission and the schedule of rates therein embodied.

All of which is ordered, adjudged and decreed by the court (R. 56).

Opinion of Lower Court (Caption Omitted).

Be it remembered, That in the District Court of the United States for the District of Indiana, at the United States Court House, in the city of Indianapolis, Indiana, on Friday, the 3d day of October, 1924, at 11:00 o'clock in the forenoon, the following proceedings were had in the above entitled cause, Honorable Ferdinand A. Geiger, Judge, presiding:

The Court: Are all, who desire to be present, present as parties in interest here?

Mr. Baker: So far as we know, your Honor.

The Court: Gentlemen, I have asked you to meet here at this time to the end that I could give expression to such views as I have in this case orally and, by necessity, somewhat informally, at the expense of, perhaps, the conciseness which may ordinarily attend the preparation of a written opinion. In many ways, that is more satisfactory, especially if the court makes up its mind to address itself quite exclusively to the parties and their counsel, in view of the matters in interest.

The case comes here for review of a finding made by the Public Utility Commission upon the value of the property of the plaintiff utility that is used and useful in the public service and the fundamental (fol. 99), and, as I believe, the single question is that of value, is that of a consideration of a finding that has been made by the Commission in the light of the principles which the plaintiff seeks to invoke as controlling any tribunal upon the matter of assessment of valuation of property within the meaning of the Fourteenth Amendment of the Constitu-

tion of the United States, when that valuation is directed toward the establishment of a rate of return upon such property.

Now, the court is able, at the outset, to refer, by name at least, with some familiarity, to cases that have become conspicuous in the consideration of questions of this character. Up to a year and a half ago—approximately that time—of course, there had been many rate cases, many cases presenting issues of valuations for the purpose of determining rates, in which elements to be considered by the courts or by other tribunals in a determination of value, have been considered. But the cases that are popularly referred to as the Missouri Telephone case, the Georgia Power case and the Bluefields case, to which may now be added the Pacific Gas and Electric case, decided in June last, have been pressed upon the courts and upon the tribunals, as indicating a deviation, in this narrow aspect disclosing a basis for consideration of evidence and, obviously, the finding that is here under review is not challenged, broadly speaking, except upon the alleged failure of the respondent Utility Commission to pay heed to these rules of evidence that have been promulgated in these recent cases. I say that is true broadly speaking. The plaintiff is here, content to rest its case narrowly upon that assertion in (fol. 100) the first instance. Now, cases like the Minnesota rate case dealt with such elements as value, disclosed by evidence of a certain character. The Des Moines Gas Company case made a reference to evidence generally characterized as evidence showing reproduction cost. The cases, many of them, refer to evidence, and the theory of valuation established thereby, such as historical cost, prudent investment value; and, in that situation, we are brought to a consideration, at the

outset, of what, if any, change was made in a concrete way by the three or four cases that have been decided in the last year, which, so the plaintiff here contends, deal with the evidence which is put forward, as exhibiting reproduction costs spot, as having a controlling or dominating influence upon the court in the determination of questions of this character.

Now, speaking somewhat freely, counsel will recall that during the argument of this case, the court manifested, or at least tried to manifest, some scepticism respecting the tenability of the plaintiff's insistence that the court, or any investigating and appraising tribunal, is bound to give what was characterized as controlling consideration to evidence of that character; and, with like freedom, I will say that the skepticism remained with me until I thought I had fairly effectively discharged my duty of studying the cases to which reference was made, and, when I have done that, I have no hesitation in sustaining, generally, the plaintiff's insistence with respect to the modified rule promulgated by these recent cases. Granting that these cases were decided at a time when the court had, as a matter of history in this particular field of jurisprudence, full cognizance of the probative character and the propriety of considering evidence such as is properly called evidence of historical cost, evidence of (fol. 101) reproduction cost upon a certain price level, evidence of value which is called prudent investment value, and, fourth, evidence of what is strictly and technically reproduction spot depreciated at the time of the inquiry; these cases press upon us sharply the query of why these cases, in their results, disclose the emphasis given to the last named of these four characters of evidence; and I am entirely content to accept the characterization made by the judges in the Sixth

Circuit in the so-called Monroe gas case; that the necessary implication from their results is that dominating consideration should be given to evidence of reproduction value and, if that means anything, it means that evidence of reproduction value spot at the time of the inquiry must be considered as evidence of a primarily different character from either of the other three kinds of evidence; that it is legally differentiated and to be differentiated from evidence of historical cost, evidence of reproduction upon certain price levels and evidence of so-called prudent investment value. In other words, reproduction cost value, as we will call it, upon a certain price level—and there is evidence in all of these hearings of that character, and there has been in the trial of this case—cannot be conceded to be evidence of a more primal character, as is evidence of spot reproduction cost, because, by its very terms, evidence of reproduction cost upon a price level basis for a term of two, five or ten years is, of itself, evidence that has been arbitrated. Therefore, if I may pursue it a little bit further and take a single, rather concrete, illustration: if we have, before us, evidence which it is said pertinently bears upon the particular query as to the value of a brick wall, and the evidence shows that the brick wall, ten years ago—I mean the material (fol. 102) and the laying—cost thirty dollars a thousand, that during each of the ten years following there was a variation, but at no time did it exceed forty dollars a thousand, but that during the last year of the ten years of reproduction cost, assuming identity, was sixty dollars a thousand, it is manifest that the original cost, ten years ago, its present reproduction cost and an averaging of everything must produce and bring before us three kinds of evidence. Now, I said a moment ago that I had become content

to accept, in a broad way, the contention made by the plaintiff upon the strength of these Supreme Court cases as to what consideration the court must give, dominantly, to this question of evidence. I want to add that I think it is quite immaterial whether the formula, as we may call it, is stated in just that way, because that is certainly a minimum of what Judge Denison called the "Necessary implications," that some regard must be given to that form of evidence, that whether we call it "dominating," "controlling," or "due," there thus becomes a demand that any finding that shall be made by the tribunal shall therein, in itself, reflect the consideration, or some of it, given to that evidence insofar as that evidence shows a gross disparity between it and other kinds of pertinent evidence. So if we take the case of the brick wall, and the testing out of this is just as true whether we take ten years price levels or take any other theory of valuation, such as historical cost, if we should state the rule as between the two theories of cost reproduction spot and historical cost, the court must give dominant due or controlling consideration to the evidence dealing with spot (fol. 103) reproduction. If, on the one hand, we have historical cost, at thirty dollars, ten years ago, and have a present cost reproduction of sixty dollars, the rule, if it means anything at all, if the court sought to reach any conclusion, demands that, as a matter of likelihood, no tribunal could rationally fix the value at thirty dollars, because that finding reflects nothing but the historical cost and, upon its very face, ignores the disparity between thirty and sixty dollars. Now, when I have gotten to this point and indicated, as I intended to, that the case is to be disposed of upon the tenable, fundamental contention of the plaintiff, as to how this evidence shall

be considered, I am entirely confident that the case, in its ultimate disposition, brings us to an exceedingly narrow compass of evidence, and, as I shall try to make reasonably clear, the case will necessitate, inescapably, the conclusion which I shall reach upon that evidence in such narrow compass, and, if that is tenable, I might say, now, it follows, as a matter of necessity, that evidence on other contentions in the case, particularly all of the contentions made here on behalf of the intervening city, are either wholly eliminated or cannot be retained, to have any probative value in the case which will alter the conclusion. So, I purpose, as briefly as I can, to consider the case, as it is before the court, with the idea, fundamentally, that if the finding, here under review can, upon any hypothesis of evidence, be sustained, upon a due application of the rules that are pressed upon the court for application, and are accepted by the court, it is the duty of the court to attempt to sustain the finding, but that if, upon no hypothesis of the evidence, or of its rational consideration under such rules, it can be sustained, it is, likewise, the duty of the court (fol. 104) to overthrow the finding; and I purpose to consider the evidence in this case largely by reflecting over against it such matters as have been brought to the attention of the court and as I consider real evidence, that are found partly in the history of this matter through an earlier proceeding before the respondent utility Commission, and through the record upon which the particular finding here is based before the Commission. I am entirely mindful of the fact that, whatever the court may say about an earlier finding, which has been referred to here as the finding in Cause No. 6613, that finding is not before the court for consideration, either to have it sustained or to have it overthrown, but, in view of the

relationship between the two proceedings, and the references made in the latter to the former, I feel entirely at liberty in referring to the earlier proceeding, as well as to the later one, as having an illuminating, to me, and an entirely persuasive effect upon the result to be reached here which, as I have said, is to be reached through a consideration of evidence. Of course, I have indicated somewhat—I trust I have, with sufficient clearness—that when the consideration of the case is gauged in the matter in which I have indicated not only the questions that are discussed here by the intervening city but questions such as usually come up in a case of this kind as to the proper method of valuation, are all subordinated. The rather interesting question of whether reproduction cost is a logical or consistent method, either legally or economically, for determining value, whether the prudent investment method is the logical and consistent method, or whether the historical cost is the logical and consistent method, are all eliminated, as having no bearing that will dominate (fol. 105) the disposition of this case, howsoever interesting they may be outside of a law suit within the compass that this one finds itself.

Now, we come to the matter of value as it is exhibited in its treatment by the respondent utility Commission in the opinion and order and the finding made in January, 1923, and known here as Order No. 6613. I am considering this, regardless of what discussion there may be as to what the original purpose of that hearing was. The record on its face shows the purpose of the Commission to make an investigation and to make a finding, which may be available for a number of purposes, under the law. That finding is exhibited in the $16,455,000, upon a hearing wherein the Commission had

before it what I have designated as these various classes of evidence. It had before it evidence showing price levels at various periods, beginning, as I recall without definite reference to the record, as early as 1910 or '11, and projected through ten years, each year, to 1913. There were two or three classes of evidence based upon varying ten-year reproduction costs. It had before it evidence of shorter periods, and had before it evidence of spot. That was true at the hearing held in the fall of 1922, which culminated in the Order of January, 1923. I assume that the Commission had before it, either in a general or in a specific way, evidence dealing with historical costs. It had before it a considerable amount of evidence, which anyone would concede, were the theory to be considered, to be pertinent as bearing upon some other theory of valuation such as prudent investment. The Commission, as shown by the face of its report, made up its finding of $16,455,000, by the utilization of four distinct elements: the (fol. 106) first, a finding that reproduction cost on a ten-year price level ending either October or later in 1922 ending December 31, 1922 —was $14,689,000. That the first element of value—the first item, I will say; and, by reference to the record, it appears that the figure—I was going to say almost within a dollar—the fact is within seventy-eight dollars, coincides with the smallest estimate or appraisal made by anybody, at that time, of reproduction cost made upon a ten-year price level; that was accepted by the Commission as its first item, in trying to aggregate values, manifestly. So it conceded, as shown by its report, and conceived the necessity of adding thereto certain other elements or ingredients of value to be taken into consideration in any theory of valuation; that is to say,

current working capital, good will, going value, or whatever it is called, and water rights, whereby the Commission reached this figure of $16,455,000.

Now, for the time being, it will suffice to call attention to the fact that at that time, when the Commission adopted the figure of $14,689,000, reproduction cost on a ten-year price level, it had before it numberless higher appraisals, evidence showing higher value not only upon the same term of price levels, but upon shorter terms of price levels, and had before it, practically without controversy at that time, reproduction spot evidence, the minimum of which unimpeached, was approximately $19,000,000. There is reflected in that record the very same thing that appears here in the evidence, a considerable variation upon the appraisals of spot reproduction. The variation in the 1922 report, as I recall, speaking generally, was something between eighteen or eighteen and a half and twenty-one or twenty-two million dollars, so that if the court were charged with the (fol. 107) problem of now interpreting the earlier finding of the Commission, in the light of the rules promulgated in these later Supreme Court cases, we would have the situation of the court making a finding upon this one class of evidence—$14,689,000, as against evidence of approximately $19,000,000, spot reproduction, which, by the very face if not by the inherence of the report, was ignored, so far as it showed a disparity of approximately four to five million dollars. Now, that will suffice for the purpose as comment upon that record.

Eleven months later, upon a subsequent hearing, this whole matter was opened up before the Commission, and there resulted a finding, at that time, bearing in mind the previous figure of $16,455,000, there resulted a find-

ing, which is now here for review, in the sum of $15,260,000, approximately $1,400,000 less than the finding made less than a year before. That is the finding that is here challenged and the court will seek briefly to test out that finding in the light of what has just been said about the earlier finding. A reference to the report of the Commission upon the earlier cause, 6613, shows that the Commission apparently, at that time, had before it the contentions of various parties as to what elements should be taken into consideration in determining value, and I will refer to what the Commission said upon that subject on page 98 of the printed report, which is here in evidence. This follows the preliminary announcement of the Commission that it would find a valuation of approximately the amount indicated, $16,455,000. The Commission then says, "In fixing this value, the Commission is bound to and has taken into consideration, so far the evidence discloses such facts, cost of reproducing the property at the time of the inquiry," which (fol. 108) I assume to mean spot reproduction cost. So, to start with, the Commission announced that the Commission considered that evidence, which, as I indicated just a moment ago, is four to five million dollars higher than the particular evidence selected by the Commission as showing value upon a ten-year price level; but the Commission proceeds, "The probable cost of reproducing it within the next few years; third, the cost of reproducing it upon the basis of average prices that have existed in the past; fourth, the trend of prices in the past and probable trend in the future; fifth, original cost of the property; sixth, prudent investment in the property; seventh, the amount of working capital necessary in the conduct of the business; eighth, its going value, its water

rights; ninth, its operating efficiency; tenth, its standard of maintenance; eleventh, kind and character of its service; twelfth, business it has attached and in prospect; thirteenth, its plans for the future; fourteenth, its ability to care for the growth of the city and the needs of its patrons; fifteenth, location of the property and the character of the city; sixteenth, its relations with the public and with the city; seventeenth, reasonableness of its rates; eighteenth, its present and probable future earning power and, nineteenth, any other facts that may be relevant."

Now, none of us would deny to the Commission, at least, an effort to give assurance that it had considered everything that was to be considered. But, of course, the serious phase of it is that, notwithstanding those protestations and those assurances, the face of the finding shows, without possibility of cavil, without possibility of even suspecting otherwise, that the Commission, although it said (fol. 109) it considered all of these matters, in fact, found in accordance with the rather precise elements, or four items, only. That is to say, taking reproduction cost on a ten-year price level, as exhibiting one kind of evidence, the face of the report, as I indicated a moment ago, shows that while the Commission may, as it says, have considered spot reproduction costs of nearly five million dollars higher, its consideration has led it to ignore it.

Now we come—and after this discussion, I will try to be even more brief that I thought I would be—we come to the later report which is here under review now and, if we are justified at all in paying any heed to the matters that I have discussed, of course, the first query that comes up is how the Commission ever was able to find

a value even lower than the one of a year before. The Commission in the later report, refers to the prior schedules under the evidence of appraisals and values upon the different theories of original cost reproduction upon terms of price levels and spot, and, then, without segregating items of value, reaches this conclusion of a lower value by a million and a quarter, or more.

Now, the Court is required, as it seems to me, to apply the principles that are to be discussed and to be accepted, as I indicated in my preliminary remarks, as to what the Supreme Court meant by what it said in these three cases. Is it possible—and when I ask that question, I assume that the answer will take cognizance of the proper attitude of wanting to proceed rationally—is it possible to say that, upon the record which we have here, against which I have reflected the two reports, and this evidence here is, generally speaking, of the (fol. 110) same character of evidence that was before the Commission, upon each of the hearings, namely, in exhibiting different kinds of evidence and the different variations between witnesses who seek to substantiate one level or one theory rather than the other,—there is that same consistent variation, if I may use that sort of a term,—is it possible or can the court now rationally say that the Commission here and, in order to test it out, include the court here, can, by any sort of examination of the evidence, reach a conclusion that upon unimpeached evidence showing a minimum of spot reproduction values at $19,000,000, it will still find reasonable value at $15,260,000? Now, it is perfectly evident, upon an examination of these two reports, that if the Commission, doing what it did upon the earlier hearing, was justified, upon accepting the ten-year price level which it believed, at that time,

it was justified in accepting and adding thereto going values and so forth, and could thus find the value to be $16,455,000, at the outset, in view of the later period, and scarcely any greater variation in the price levels, there ought to be some answer, and the query at once arises, "How can the Commission possibly reach a valuation of fifteen million, two hundred and some odd thousand?" and the answer cannot be found except conjecturally, as I see it, in one or two ways: either the Commission cut down, beyond any limit that was possible upon the evidence, the valuation, as indicated, upon a ten-year price level, or it substantially ignored every other element of value, such as going concern value. The two cannot be reconciled in any other way. Now, that brings us to the evidence in this case and, as I said, can the Commission or can (fol. 111) this Court now, say that there can be a rational reconcilement between unimpeached evidence of $19,000,00, as a minimum cost reproduction value spot, and any other price level, particularly one showing a disparity of five million dollars—four to five? I think that answers the question that is put up to the court in this case.

Now, I think it is due to the parties, if I have made myself fairly clear, to make a reference to some of the things the court here is concerned with, either confirming or impeaching the finding here, and, if it does the latter, it is justified in doing it upon purely negative grounds, namely, that the finding does not reflect certain things which must be considered and which, if considered, must bring about a finding of a larger amount. Now, some of the contentions of the city here, are entirely eliminated. That there is a field, here, within which credit to be given to evidence may be discussed, goes

without saying; and, illustratively I will take the evidence that is presented here on behalf of the plaintiff, showing spot reproduction values of approximately $25,000,000. That figure, of course, includes certain elements of value to be considered in any event and, by way of excluding those elements, I will put the figure at approximately $23,000,000. Yet, the defendant Commission, through its own witnesses, through its engineers, furnishes, as a minimum figure to be considered, exhibiting spot reproduction values at the time of the inquiry, approximately $19,000,000. Now, I could say, if the problem were before the court to consider those ranges of the evidence bearing upon that one kind of reproduction value, that there is a field of arbitration between them. The court might well say, "Naturally, the petitioner, here, is a utility. Complainant has the (fol. 112) same zeal that other litigants have; that is found in its witnesses. They are apt to exaggerate, to give the higher valuation." Of course, if we consider that, the converse is true, that on behalf of the respondents there may be a temptation for its witnesses to minimize, and it leaves us where the court can, without hesitation, say that $19,000,000, not only in this case, but in each of the hearings that have been had before the Commission, reflects, unimpeached, the reproduction value. Now, can the court, as I said a while ago, say that these can be reconciled rationally, as judicial or legislative duty is discharged, in a finding which shows that the disparity between the two kinds of evidence was considered solely in such a way as to ignore it? That, in my judgment, is the infirmity of this case, and it is the one thing that overthrows this finding.

I am not confronted with the problem of fixing a valuation within the range of dispute upon spot reproduction.

I say I am not confronted with that problem, because the complainant comes into this court and offers to accept $19,000,000, as a fair basis of valuation, even though, as it says, and I think has reason to say and could support it, it could, upon the record, sustain a higher valuation. That will be the finding, and it follows, I think without dispute—without the possibility of serious dispute,—that, that being so, the rates or the tariffs or charges that have been promulgated by the respondent Commission, no matter what figure of measuring it, what rate of measuring it we adopt, providing it be above five per cent, that schedule will not satisfy the constitutional requirements of plaintiff in this case, and the plaintiff may take a decree in accordance (fol. 113) with what I have said.

Whereupon, the hearing was concluded.

The foregoing may be filed. F. A. Geiger, Dist. Judge.

Law Under Which Appellee Was Incorporated.

Appellee was organized under the Acts of the Indiana Legislature, 1881, page 60 (in force February 4, 1881).

A part of Section 1 of said Acts of 1881 is as follows:

> "In case of the sale of any water-works property within the state, by the judgment and decree of any court of competent jurisdiction within this state, the purchaser or purchasers thereof, the survivor or survivors, or associates or assigns, may form a corporation, by filing in the office of the Secretary of State a certificate specifying the name and style of the corporation; the number of directors, the names of the first directors, and the period of their services, not exceeding one year; the amount of its capital stock, and the number of shares into which said capital is to be divided;

and the city in and near which said corporation proposes to operate."

A part of Section 2 of said Acts of 1881 is as follows:

> "Such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to the said water-works property, so purchased as aforesaid, and future acquisitions, and all of the real estate and personal property, choses in action and contracts appertaining to the same, which were possessed or enjoyed by the corporation that owned or held said water-works property, previous to such sale, by virtue of the law of its organization; and shall have no other powers, privileges, or franchises. Such powers, privileges and franchises shall be subject to the restrictions, limitations and power of supervisory control contained in the laws under which such original organization was formed (namely, the act approved March 6, 1865)."

A part of Section 8 of the Indiana Legislative Acts of 1865 (approved March 6, 1865) is as follows:

> "But no restriction shall be imposed by said common council which will prevent such company realizing upon its capital stocks an annual income or dividend of ten per cent, after paying the cost of all necessary repairs and expenses."

Section 11 of said Acts of 1865 is as follows:

> "Such company shall annually, at least ten days before the election of directors, make out a full and complete exhibit of all the operations of the company, during the current year, containing a correct account of all the receipts and disbursements thereof; also, showing the amount of capital stock subscribed, the amount of such capital stock

actually paid in, the amount paid out, during the year, in the construction and repair of the works, the amount paid out in the ordinary expenses of the company, classifying the expenditures and giving the amount paid out under each classification, as the same appears on the books of the company, the amount collected from such city, and the amount collected from individuals, for water supplied, the amount placed to the credit of the reserve fund, the amount of dividends declared, and the amount of such dividends drawn, which exhibit shall be verified by the oath of the president and secretary, and published in some public newspaper of general circulation in such city, ten days successively, before such annual election."

Law Under Which the Public Service Commission Operates.

The appellant, Public Service Commission of Indiana, was created under the Acts of the Indiana Legislature, 1913, page 167 (in force May 1, 1913).

Section 7 of said Acts of 1913 provides in part:

Sec. 7. "Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful."

Sec. 9. "The Commission shall value all the property of every public utility actually used and useful for the convenience of the public. As one of the elements in such valuation the Commission shall give weight to the reasonable cost of bringing the property to its then state of efficiency. In making such valuation, the Commission may avail itself of any information in possession of the State

Board of Tax Commissioners or of any local authorities. The Commission may accept any valuation of the physical property made by the Interstate Commerce Commission of any public utility subject to the provisions of this act."

Sec. 15. "The Commission shall prescribe the forms of all books, accounts, papers and records required to be kept, and every public utility is required to keep and render its books, accounts, papers and records accurately and faithfully in the manner and form prescribed by the commission and to comply with all directions of the Commission relating to such books, accounts, papers and records."

Sec. 25. "All money thus provided for shall be set aside out of the earnings and carried in a depreciation fund. The moneys in this fund may be expended for new construction, extensions or additions to the property of such public utility or invested, and if invested, the income from the investment shall also be carried in the depreciation fund. This fund and the proceeds thereof, shall be used for no other purposes than as provided in this section and for depreciation. But in no event shall the moneys expended from the fund for new constructions, extensions or additions to the property be credited to or considered a part of the capital account of any public utility, but shall always be charged against the depreciation fund."

Sec. 72. "Whenever upon an investigation, the Commission shall find any rates, tolls, charges, schedules or joint rate or rates to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential, or otherwise in violation of any of the provisions of this act, the Commission shall determine and by order fix just and reasonable rates, tolls, charges, schedules or joint rate to be imposed, observed and followed in the future in lieu of those found to be unjust, unreasonable,

insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this act."

Sec. 76. "The Commission may at any time, upon notice to the public utility and after opportunity to be heard as provided in Sections 57 to 71, rescind, alter or amend any order fixing any rate or rates, tolls, charges or schedules, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

Sec. 79. "Every proceeding, action or suit to set aside or vacate any determination or order of the Commission or to enjoin the enforcement thereof, or to prevent in any way such order or determination from becoming effective, shall be commenced and every right of recourse to the courts shall be exercised within sixty (60) days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit or to exercise any right of recourse to the courts, shall terminate absolutely at the end of such sixty (60) days after such entry or rendition thereof: Provided, That if a rehearing has been petitioned for and granted the right of recourse to the courts shall terminate thirty days (30) after the final determination by the Commission after such rehearing."

The Indeterminate Permit Law.

Appellee is operating under a so-called indeterminate permit obtained in 1922 (R. 144). The latest statute of Indiana pertaining to the granting of the indeterminate permit is found in the Acts of the Indiana Legislature, 1921, page 197. Such act is as follows:

Section 1. Be it enacted by the General Assembly of the State of Indiana, That any public util-

ity operating under an existing license, permit, or franchise, from any county, city or town, within the State of Indiana, shall upon filing at any time prior to July 1, 1923, with the auditor or clerk of such county, city or town which granted such license, permit or franchise, and with the public service commission of Indiana, a written declaration, legally executed, that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof an indeterminate permit as provided in the act creating the Public Service Commission of Indiana, entitled, 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and such public utility shall hold such permit under all the terms, conditions and limitations of said act as fully and completely as if the same had been done prior to July 1, 1915."

Tax Law of Indiana Applicable to Appellee.

All property in Indiana is valued for taxation purposes at the true cash value thereof, and public water utilities are required to make a verified return of their property to the State Tax Board each year between March 1 and April 1. (Acts Indiana Legislature 1919, p. 189.)

The following are sections of said 1919 Acts:

Sec. 3:

"All property of every kind and nature, both real and personal and wherever situate, owned or possessed, and subject to taxation within the State of Indiana, shall be assessed and valued for taxation purposes, at the true cash value thereof, on the first day of March in each year in which it is subject to assessment and valu-

ation for taxing purposes." (Acts 1919, p. 198.)

Sec. 88 (in part):

"Every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever that now or hereafter may own, operate, manage or control any plant or equipment within the State of Indiana for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public shall be deemed a public utility, and every such public utility shall annually, between the first day of March and the first day of April, make out and deliver to the State Board of Tax Commissioners a statement, verified by the officer or agent of such public utility making such statement, with reference to the first day of March of the current year showing:

"Fourth. The true cash value of such capital stock or investment.

"Eighth. The name and value of each franchise or privilege owned or enjoyed by such public utility.

"Ninth. A schedule of all other property not included in the foregoing, both tangible and intangible, within the State of Indiana, and where situate, together with a statement of the true cash value of the same.

"Eleventh. The true cash value of all tangible property." (Acts 1919, pp. 243-4.)

Appellee's Monopoly in Its Business.

In Indiana even a municipality can not compete with an existing Public Service Corporation without first obtaining a certificate of public convenience and necessity.

Section 98 of the Public Utility Laws of Indiana (Acts Indiana Legislature 1913, p. 167) is as follows:

"No municipality shall hereafter construct any such plant or equipment where there is in operation in such municipality a public utility engaged in similar service under an indeterminate permit as provided in this act without first securing from the Commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such municipal utility. But nothing in this section shall be construed as preventing a municipality acquiring any existing plant by purchase or by condemnation as hereinafter provided."

Appellee's Acknowledgment of Service of Brief and Notice of Filing Same.

Received service of foregoing brief and notice that same will be filed in the office of the Clerk of the Supreme Court of the United States on or about the.....day of ....., 192...

Acknowledged at Indianapolis, Indiana, this..... day of ....., 192...

.....

Solicitors for Appellee.